TANEY

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Abraham Lincoln and the Supreme Court

Roger Taney

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TANEY VS. TANEY.

The elaborate opinion put on record and published to the world by Chief Justice TANEY, in the Merryman case, was so obviously intended as a grave inculpation of the President of the United States, and is so utterly wanting in any expressions of sympathy, either with him in the grave emergency in which he is called to act or with the cause of the Union which he is striving to uphold, that, even if all the legal *dicta* the chief justice propounds were conceded to be correct, no patriotic mind could approve of the too evident design to weaken and undermine the confidence of the country in the President. In the midst of a rebellion which threatens the very existence of the government, its highest judicial officer volunteers the weight of his influence and of the influence of his high position in favor of the rebels. *Volunteers* we say, because a strict interpretation of his duty required him to do no more than to award the writ when applied for. The attachment against Gen. CADWALADER for contempt of court, and the publication of a document intended to prove that the President is striking at the very foundation of public liberty, can be regarded, under the circumstances, as nothing better than a gratuitous manifestation of hostility to the government and sympathy with the rebels.

Luckily we are able to appeal, not exactly from TANEY drunk to TANEY sober, but from TANEY the sympathizer with secession to TANEY the vindicator of legitimate authority—from TANEY petulent and testy at a disregard of his mandate, publishing an opinion written in the warmth of excitement, to TANEY delivering the well-weighed judgment of the Supreme Court, after argument by at counsel and consultation with his brethren o the bench—from TANEY in favor of rebels in 1861 to TANEY against rebellion in 1843. The quotation which follows is from an opinion delivered by Chief Justice TANEY in a case arising out of the Dorr rebellion, in Rhode Island, contained in the seventh volume of Howard's Reports. The whole cast of thought and course of argument are a perfect antithesis to his late opinion in the Merryman case He maintained, in 1843, that the ordinary course of proceedings in courts of justice would be utterly unfit for a crisis which required the prompt suppression of a rebellion, and that a power adequate to the emergency could be nowhere so safely lodged as in the hands of the President of the United States. Human prudence and foresight, he then said, could not well provide stronger safeguards against a willful abuse of power than the responsibility the President could not fail to feel when acting in a case of so much moment. When a rebellion has made such headway that it becomes necessary to use military force to suppress it, a state of war exists, and the government must resort to the rights and usages of war to maintain itself and overcome unlawful opposition. Judge TANEY was of opinion, in 1843, that, in such a state of things, "the officers engaged in "its military service might lawfully "arrest any one they had reasonable "grounds to believe was engaged in the "insurrection." In apparent forgetfulness of having delivered this solemn official judgment twenty years ago, the chief justice now contends that no person can, without a violation of the Constitution, be deprived of liberty without judicial process, and calls this a great fundamental law "which Congress itself could not suspend," and complains tha it is now disregarded "by a military order supported by force of arms." And this is from the very same judge who, twenty years ago, declared that this power, which he now holds up to public odium as a tyrannical usurpation of authority, "is essential to the very existence of every government!" We ask Chief Justice TANEY and his apologists to read, mark, and inwardly digest this quotation from his former sound and impartial opinion:

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. *If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.* Yet if this right does not resine in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the politisal, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize as lawful.

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It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, *the interposition of the United States must be prompt or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide.* At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin *vs.* Mott, 12 Wheat., 29-31. The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a state government. The power given to the President in each case is the same, with this difference only: that it cannot be exercised by him in the latter case, except upon the application of the Legislature or executive of the state. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that, "*whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.*" The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the state, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.

The remaining question is whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the Legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a state. Unquestionably, a military government, established as the permanent government of the state, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. *And unquestionably a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority* IT WAS A STATE OF WAR, AND THE ESTABLISHED GOVERNMENT RESORTED TO THE RIGHTS AND USAGES OF WAR TO MAINTAIN ITSELF AND TO OVERCOME THE UNLAWFUL OPPOSITION. AND IN THAT STATE OF THINGS THE OFFICERS ENGAGED IN ITS MILITARY SERVICE MIGHT LAWFULLY ARREST ANY ONE WHO, FROM THE INFORMATION BEFORE THEM, THEY HAD REASONABLE GROUNDS TO BELIEVE WAS ENGAGED IN THE INSURRECTION; AND MIGHT ORDER A HOUSE TO BE FORCIBLY ENTERED AND SEARCHED, WHEN THERE WERE REASONABLE GROUNDS FOR SUPPOSING HE MIGHT BE THERE CONCEALED. WITHOUT THE POWER TO DO THIS, MARTIAL LAW AND THE MILITARY ARRAY OF THE GOVERNMENT WOULD BE MERE PARADE, AND RATHER ENCOURAGE ATTACK THAN REPEL IT. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable.

If Chief Justice TANEY had viewed the Merryman case in the light of the principles so clearly stated in this opinion, he would not have represented the arrest and detention of that individual as a proof that "the people of "the United States are no longer living un-

(incomplete)

New York World
6/7/1861

"Tut! tut!" says the clergyman, "a sword, Rachel, — in my study?"

"To be sure! why not?" says Rachel. "And if you like, I will hang my picture, with the doves and the olive-branch, above it; and there shall be a shelf for hyacinths in the window."

Thus she ran on in her pretty housewifely manner, cooing like the doves she talked of, plotting the arrangement of the parlor opposite, of the long dining-room stretching athwart the house in the rear, and of the kitchen under a roof of its own, still farther back, — he all the while giving grave assent, as if he listened to her contrivance: he was only listening to the music of a sweet voice that somehow charmed his ear, and thanking God in his heart that such music was bestowed upon a sinful world, and praying that he might never listen too fondly.

Behind the house were yard, garden, orchard, and this last drooping away to a meadow. Over all these the pair of light feet pattered beside the master. "Here shall be lilies," she said; "there, a great bunch of mother's peonies; and by the gate, hollyhocks"; — he, by this time, plotting a sermon upon the vanities of the world.

Yet in due time it came to pass that the parsonage was all arranged according to the fancies of its mistress, — even to the Major's sword and the twin doves. Esther, a stout middle-aged dame, and stanch Congregationalist, recommended by the good women of the parish, is installed in the kitchen as maid-of-all-work. As gardener, groom, (a sedate pony and square-topped chaise forming part of the establishment,) factotum, in short, — there is the frowzy-headed man Larkin, who has his quarters in an airy loft above the kitchen.

The brass knocker is scoured to its brightest. The parish is neighborly. Dame Tourtelot is impressive in her proffers of advice. The Tew partners, Elderkin, Meacham, and all the rest, meet the new housekeepers open-handed. Before mid-winter, the smoke of this new home was piling lazily into the sky above the tree-tops of Ashfield, — a home, as we shall find by and by, of much trial and much cheer. Twenty years after, and the master of it was master of it still, — strong, seemingly, as ever; the brass knocker shining on the door; the sword and the doves in place. But the pattering feet, — the voice that made music, — the tender, wifely plotting, — the cheery sunshine that smote upon her as she talked, — alas for us! — "All is Vanity!"

ROGER BROOKE TANEY.

A LITTLE more than two centuries ago, Thomas Hobbes of Malmesbury published his great treatise on government, under the title of "Leviathan; or, the Matter, Form, and Power of the Commonwealth, Ecclesiastical and Civil," — in which he denied that man is born a social being, that government has any natural foundation, and, in a word, all of what men now agree to be the first principles, and receive as axioms, of social and civil science; and declared that man is a beast of prey, a wolf, whose natural state is war, and that government is only a contrivance of men for their own gain, a strong chain thrown over the citizen, — organized, despotic, unprincipled power. To this faithless and impious work, which at least did good by shocking the world and rallying many of the best minds to develop and defend the true principles of society and the state, he put a fit frontispiece, a picture of the vast form

of Leviathan, the Sovereign State, the Mortal God,—a gigantic figure, like that of Giant Despair or the horrid shapes we have sometimes seen pictured as brooding over the Valley of the Shadow of Death,—a Titanic form, whose crowned head and mailed body fill the background and rise above the distant hills and mountain-peaks in the broad landscape which is spread out below, with fields, rivers, harbors, cities, castles, churches, towns and villages, and ships upon the seas and in the ports. Its body and limbs are made up of countless human figures, of every class, all bending reverently toward the sovereign head. Its arms stretch forward to the foreground. In one hand it holds a magnificent crosier, in the other a mighty sword, which reach across and cover the whole. It is surrounded with emblems of power, of which it is the life and embodiment. In the front is a fortified city, with its streets and gate, its cathedral rising high above all other structures, surmounted by the cross, the flag flying from the forts, the sentinel on the ramparts. Its fortresses seem to defy and command the whole empire over which Leviathan predominates. To show more fully how all-pervading and resistless is the power of this monster made of mortal men, and the means and extent of its control in Church and State, to impress the senses, the emblems of its spheres and its instruments are depicted below. First is a castle on a rocky height, with the smoke rolling from its battlements, from which a cannon has just been fired; opposite, a church, with a figure holding the cross above its roof of faith; here a coronet, opposite a mitre; here is a cannon, to thunder in civil war; opposite are the mythic thunderbolts for the fulminations of the Church; below are arms, drums, banners and flags, helmet and halberd, spear and sword and matchlock; opposite appears a front, between the devilish horns of which, marked "dilemma," is formed a sort of trophy, made up of a trident spear, labelled "syllogism," and bifurcated weapons, named "real and intentional," "spiritual and temporal," and one beyond whose long straight point, labelled "direct," there is another sharp, keen one, curving round and covering it, labelled "indirect"; last is the battle-field, with armies rushing together in deadly charge, their flags flying above the long lines whose sloping spears bristle above the clouds of smoke and dust, the cavalry and foot engaged with sabres and pistols, men and horses fallen, the victors, the wounded, the dying, and the dead,—the dread arbitrament of war; opposite, the judges ranged in formal order, with their caps and black robes,—a Rhadamanthine tribunal. Seeing such a summary and embodiment of his idea, a man will shudder the more he ponders on such a conception of the state as such a monstrous idol, which men have fashioned out of their own bodies and invested with the attributes of superhuman power, and worshipped as the creator of Justice and Law, Peace and Order, Truth and Religion, and served and obeyed as their Tyrant and King.

The American state,—which, as Franklin said, "first set forth religious truth as the basis of government," formed by the people, who, calling on all mankind to witness their solemn appeal to the Supreme Judge of the world, "pledged themselves," as Adams said, "to extinguish Slavery as soon as practicable,"—the state formed to establish justice,—the state for which the founders reverently adopted as the true emblem the Goddess of Liberty,—had, at the time when Slavery, the patricide, waged this war to finish the revolution already almost complete, so essentially changed, that it bore a striking resemblance to that dreadful picture of the giant form of the Leviathan. *Populus Romanus repente factus est alius.*

It will be difficult to decide which branch of our government was most efficient in producing this change; as it will be difficult for one who considers the principle, or want of principle, on which this Juggernaut was constructed, to decide which would be the more horrible, a decision by battle or by the

robed ministers of evil. But as the Leviathan, Slavery, — the Mortal God, the incarnation of Evil, — is growing more and more shadowy, and men again behold the heavenly Guardian of their State, Americans feel, and the world agrees, that war, though it reaches other classes and in different form, is really attended with less horror and woe at the time than several judicial decisions have occasioned; and that the lasting results of battles are incalculably more insignificant than the judgments of courts may be.

Roger Brooke Taney was, when nearly sixty years old, placed at the head of the Judiciary, at a critical time in American affairs. The Slave Power, so successful in extending its dominion, and already the controlling influence in the government, was pressing its unholy and arrogant demands openly and without shame. It had destroyed civil liberty in the Slave States, and was fast destroying it in the Free. It was stifling the right of petition in Congress, and smothering free speech in the States. The Executive was recommending that the mails should be sifted for its safety. The question of the right of Slavery in the Territories and the Free States was taking form, and the slave-catchers claimed to hunt their prey through the Northern States, without regard to the rights of freemen or the law of the land. Taney had long been known as an astute and skilful lawyer, a man of ability and learning in his profession — as ability and learning are commonly gauged. He had been Attorney-General of Maryland, and in 1831 had been appointed Attorney-General of the United States. He was an ardent partisan supporter of the administration; and in 1833, when Duane refused to remove the deposits, he was appointed to the Treasury as a willing servant, and did not hesitate to do what was expected of him.

In 1835, while the country was deeply agitated by questions concerning the rights of States and the powers of the government, he was nominated to a vacancy on the Supreme Bench. His opinions on those questions were well known, and the consideration of his nomination indefinitely postponed.

But some time after the death of Chief Justice Marshall, which occurred on the 6th of July, 1835, Taney was nominated as his successor, and in 1836, the political complexion of the Senate having in the mean time changed, was confirmed by party influence, and took his seat at the head of the Judiciary in January, 1837.

He was essentially a partisan judge, as much so as were the judges of King Charles, who decided for the ship-money in accordance with their previously announced opinions. The President wrote him a letter in which he thanked him for abandoning the duties of his profession and promptly aiding him by removing the deposits; and Webster declared he was the pliant tool of the Executive. The Massachusetts, Kentucky, and New York cases in the very first volume of the Reports showed that, if not swift to do the work for which he had been selected, he did not hesitate to embody his political principles in judicial decisions. But we do not intend to examine these, or to review the long series of decisions, extending over more than a quarter of a century, and through more than thirty volumes, on the common or even the grander questions discussed in that tribunal, which will all, or nearly all, be unknown, — save to the profession, — and will have but little influence on the welfare of the country and the course of history. We would consider only the more important of those decisions touching Slavery, the cause of this Revolution, which have already shaped the course of events, and become the record of his character as a jurist, a patriot, and a man.

His private opinions about Slavery are not matter of comment or inquiry.

There are two official opinions given by him while Attorney-General in 1831 which relate to the matter. In one of these he had to consider whether the United States would protect the right of a slave-master over his slave, em-

ployed as a seaman on a ship trading to one of the States, in which he expressed the opinion that the United States could not, by treaty, control the several States in the exercise of their power of declaring a slave free on being brought within their limits. In the other, he held that a person removing his slaves with him to Texas, merely for a temporary sojourn, and with the intention of returning again in a short time to the United States, might safely bring his slaves back with him. But he then declared, that if the owner had placed his slaves in Texas as their domicile, he would be liable to prosecution, under the act of Congress, if he should bring them back into the United States.

In 1837, the very year Taney took his seat on the Supreme Bench, he gave the opinion of the Court in the cases of the Garonne and the Fortune, two vessels libelled, under the act of 1818, for bringing as slaves into New Orleans persons who had, in 1831 and 1835, been carried to France and some of them manumitted there. The judge then said that, "assuming that by French law they were entitled to freedom, there is nothing in this act to prevent their mistress bringing them back and holding them *as before*."

He seems to have considered it immaterial, or to have been ignorant, that, in accordance with the maxim, "Once free, forever free," declared in the courts of his own State of Maryland, the courts of Louisiana held, as did those of Kentucky and other States also, that, "having been for one moment in France, it was not in the power of her former owner to reduce her again to slavery," and to have forgotten the doctrines of one of his own opinions.

Slavery, when he came upon the bench, began to look to the Supreme Court as its surest defence.

The Prigg case, as it is called, or, as lawyers call it, Prigg *vs.* The Commonwealth of Pennsylvania, was an amicable suit; the parties in interest being the States of Maryland and Pennsylvania, which were represented by the ablest counsel, who came into court, as Johnson, Attorney-General of Pennsylvania, said, "to terminate disputes and contentions which were arising, and had for years arisen, along the border line between them, on the subject of the escape and delivering up of fugitive slaves." The counsel regarded themselves, as he said, as engaged in "the work of peace," and "of patriotism also."

Edward Prigg and others were indicted in Pennsylvania for kidnapping a negro woman on the 1st of April, 1837. The cause came to trial before the York Quarter Sessions, May 22, 1839; and the counsel agreed that a special verdict should be taken and judgment rendered, and thereupon the case carried up, so as to present the questions of law arising, under the Pennsylvania Emancipation Act of 1780, upon the United States act of 1793 touching fugitives from labor, and the statute of Pennsylvania passed in 1826, which provided for the seizure and surrender of fugitive slaves and for the punishment of kidnapping. The case was made up and presented in that spirit of compromise which has been the bane and delusion of America, (as if there could be any compromise of justice,)—the counsel for Pennsylvania claiming that their statute was auxiliary to that of the United States, really beneficial to Slavery, and that they advocated the true interests of the South as well as of the Union and the North,—in order to have the Judiciary authoritatively settle the vital question of the rights of the master in the seizure, and of the States in the rendition, of fugitive slaves. The Court decided, fully, that the master had a right to seize his fugitive slave wherever he could find him, and take him back without process; that the law of 1793 was constitutional; and that the United States had the exclusive power of legislation on that matter.

But this did not satisfy Chief Justice Taney. He agreed that the master had the right of seizure. He declared that this right was the law of each State, and that no State had power to abrogate or alter it, and foreshadowed the

idea that the Constitution carried Slavery over all the Territories and States. But he dissented from the Court when they held the Pennsylvania act to be invalid. And without relying on any principle, without any discussion of, or the slightest allusion to, any authorities or the great fundamental questions involved in that issue, he coolly depicted the inconveniences the slave-catcher might be subject to in States where there was but one District Judge, and how essentially he would be aided by the State legislation; and pointed out to his brethren those "*consequences*" which they did "*not contemplate*," and to which they "did not suppose the opinion they had given would lead." And he said that, where the States had such statutes, "it had not heretofore been supposed necessary, in order to justify those laws, to refer them to the questionable powers of internal and local police. They were believed to stand upon surer and safer grounds, to secure the delivery of the fugitive slave to his lawful owner."

Counsel said, "The long, impatient struggle on that question was nearly over. The decision of this Court would put it at rest." It was not so. This decision was made in 1843. But from that time the strife over that question was more violent than ever. The Slave Power took this decision as a new concession and guaranty. It certainly affirmed the right of the master to exercise his absolute power, in the most offensive form, to be beyond control of all legislation whatever, State or National. The Court doubtless meant, as the States and the counsel did, by giving to Congress the exclusive power of legislation on the surrender of fugitives from labor, to settle this question in such form as to satisfy the Slave Power.

If the opinion of Mr. Webster be worth anything, they forgot the maxim, "Judicis est jus dicere, non dare." Most surely Taney ignored his State-Rights doctrines when, looking far on for the interests of Slavery and the convenience of slave hunters, he held the United States authorized to legislate on the matter; and, disguising the poison under the phrase, "the Constitution and every clause of it is part of the law of every State of the land," he put forth the dogma that the rendition clause merely provided for the rights of citizens, "put them under protection of the General Government," and made "the rights of the master the law of each State." He was declaring a rule of government, not a rule of law, and creating a theory for the defence of property in man.

In 1850 he went a step farther. A Kentucky slave-owner had been in the habit of letting some of his slaves go into Ohio to sing as minstrels. He filed a bill against a steamboat and her captain to recover the value of those slaves, who, after their return, had been carried across the river and escaped. It must be remembered that they had not first escaped, but had been *carried* to Ohio. But here, again, without recurring to any of the principles presented and fairly involved in such an issue, again looking far on to consequences in the interest of Slavery, again ignoring, not only the first principles of jurisprudence and the declared ends of the Constitution, but even his own political State-Rights doctrine, (for if these men had not escaped, why could not Ohio free them?) he declared a doctrine pregnant with mischief, — that each State had the absolute right to decide the status of all persons within its limits. This, too, has gone with war. But his intent is none the less clear. The theory was obviously stated with a far-reaching view to remote consequences. And it must be considered in connection with the fact that, in lieu of the old rule which had been recognized by the Slave States, that a slave, by being carried to a Free State or domiciled for a day in a foreign country by whose law he was enfranchised, was liberated forever, — once free, free forever and everywhere, — the Slave Power was beginning to assert a new rule for reënslavement by recapture and on return.

But the Slave Power, having controlled the executive and directed the legislative branch of the government, again

turned to judicial power as the surest, and best able to work out easily the largest and most lasting results. The Dred Scott case was begun in 1854, and brought up, twice argued, and finally decided in 1856; Chief Justice Taney delivering the opinion of the Court. The facts and result of that case are well known. In a cause dismissed for want of jurisdiction, this Court pretended to decide that no person of African slave descent could ever be a citizen of the United States, and that the adoption of the Missouri Compromise line by the Congress of 1820, acquiesced in for thirty-five years, was unconstitutional. This doctrine was entirely extrajudicial, and, as one of the judges declared, "*an assumption* of authority."

We do not propose to discuss this decision. It was the lowest depth. It probably did more than all legislative and executive usurpations to revive the spirit of liberty, — to recall the country to the principles of the founders of the Constitution. It began the good work, — *evoking* the truth, by showing its own fiendish principles, — which the war is likely to finish forever. We wish, however, to give an analysis of the doctrines and reasons on which his decision was based, and therefrom to show what is the true place of Roger Brooke Taney as a jurist and a patriot.

Now the course of his argument was this, — admitting that all persons who were citizens of the several States at the time of the adoption of the Constitution became citizens of the United States, to show that persons of African descent, whose ancestors had been slaves, were not in any State citizens.

And first, he tries to show this "by the legislation and histories of the times, and the language used in the Declaration of Independence"; and after referring to the laws of two or three Colonies restricting intermarriage of races, and affirming that, though freed, colored persons were in all the Colonies held to be no part of the people, and declaring that "in no nation was this opinion more uniformly acted upon than by the English government and people," admitting that "the general words '*all men* are created equal,' etc., would seem to embrace the whole human family," and that the framers of the Declaration were "high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting," he argues that, because they had not fully carried out, and did not afterwards fully carry out, their avowed principles by instant and universal emancipation, therefore he can give to as plain and absolute words as were ever written, expressive of universal laws, a force just opposite to their terms; — a new form of argument, which begins by assuming the truth of the proposition desired, and ends by denying the truth of the admitted premises.

He then proceeds to inquire if the terms "we, the people," in the Constitution, embraced the persons in question. Here, too, he admits that they did embrace all who were members of the several States. Then, turning round the power given Congress to end the slave-trade after 1808, and arguing from it as a reserved right to acquire property till that time; laying aside the fact that the framers of the Declaration had acted on their declared principles, and that in many States, as in Massachusetts and Vermont, even in Southern States, as in North Carolina they remained till 1837, many freed colored persons were citizens at that time, with the remark, that "the numbers that had been emancipated at that time were but few in comparison with those held in slavery," assuming that the very acts of the States suppressing the slave-trade helped instead of destroying his argument; arguing from the fact that Congress had not authorized the naturalization of colored persons, or enrolled them in the militia; arguing even from State laws passed in the most passionate moments as late as 1833; going back to the old Colonial acts of Maryland in 1717, and of Massachusetts in 1705; even coming down to the fact that Caleb Cushing gave his opinion that they could not have passports as citizens; denying that the "free inhabitants" in the Articles of

Confederation, which he was forced to concede did in terms embrace freedmen, actually did include them, because the quota of land forces was proportioned to the white inhabitants, — he affirmed that they were not and never could become citizens, that neither the States nor the nation had power to lift them from their abject condition. The United States could naturalize Indians. But neither the United States nor the individual States could make colored persons citizens.

The Chief Justice stated that colored persons were not, at the time of the adoption of the Constitution, citizens under the laws of the several States and the laws of the civilized world. But he knew, for it had been shown to him in the arguments, that such persons, and many who had been slaves, were then citizens in Massachusetts, New Hampshire, and North Carolina, as they likewise were in Vermont, Pennsylvania, and in other States. And he knew — for in 1831 he himself said it was "a fixed principle of the law of England, that a slave becomes free as soon as he touches her shores" — that he declared as law what was not the law of civilized nations; that in 1762 Lord Northington declared that "as soon as a man sets foot on English ground he is free"; and that Lord Mansfield had, in 1772, held that "Slavery is so odious that it cannot be established without positive law." He knew (or he declared what he did not know) that at that day the sentiment in France was so directly to the contrary, that in 1791 the law was "*Tout individu est libre aussitôt qu'il est en France.*" At the time to which he referred, public opinion in the American States and in foreign countries, and the legislation of the various States, were just the opposite of what he stated them to be. Liberty was just at that moment more truly the sentiment of the country and of states in amity with it than at any other. The assertion, that colored persons could not be and were not citizens of the several States, was simply false. In most if not in all of the States such persons were citizens. In 1776, the Quakers refused fellowship with such as held slaves; and that sect, through all the States, enfranchised their slaves, who, on such enfranchisement, became citizens. American courts were not behind the English courts. States adopted the language of the Declaration into their Constitutions for the purpose of universal emancipation, and the courts decided that that was its effect. At the time of the adoption of the Constitution the leading men of all sections considered emancipation essential to the realization of the American idea; for their government was founded on a theory, and avowed principles, which rendered it necessary, and which, with the performance of the pledges of the States and the exercise of the powers directly given to the Union, would make liberty universal and perpetual.

Taney even argued that persons of African descent could not be citizens, because then they could "enter every State when they pleased, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased, at every hour of the day or night, without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them full liberty of speech, in public and in private, upon all subjects upon which its own citizens might speak, to hold public meetings," and "to bear arms"! As if this would not be to a true jurist and just judge expounding a Constitution made "to establish justice" itself the ground for deciding that citizenship was opened to them by emancipation; as if the blessings of liberty ought not to prevail over any inconveniences to slave-holders.

His argument from subsequent legislation was perfectly idle. For, at most, the statutes of Naturalization and Enrolment merely showed that Congress did not then choose to apply to colored persons the power given to them in absolute terms, and which he admits they had as to Indians. While in other statutes, as that of 1803, of Seamen, and in several treaties, as, for instance, those whereby Louisiana, Florida, and New

Mexico were acquired, colored persons are expressly named as citizens.

Having denied the clear facts of history, renounced the obligation of explicit language, professed to stand on an argument every member of which was destructive of his conclusion, he thus stated the result: "They were at that time," 1789, "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them"; that the opinion had obtained "for more than a century" that they were "beings of an inferior order," with "no rights which the white man was bound to respect," who "might justly and lawfully be reduced to slavery," "an ordinary article of merchandise and traffic wherever a profit could be made of it"; and this opinion was then "fixed and universal in the civilized portion of the white race," — "an *axiom* in morals as well as politics." He then declares, that to call them "citizens" would be "an abuse of terms" "not calculated to exalt the character of the American citizen in the eyes of other nations."

No wonder the nations pointed the finger of scorn, and cried out, "Is this the perfection of beauty, the joy of the whole earth? Shade of Jefferson! is this the reading America was to give the Declaration? Did you publish a lie to the world? Spirits of Franklin, Adams, and Washington! is this your work? Americans! is this your character?"

He declares, further, that the Court has no right to change the construction of the Constitution; that "it speaks in the same words, with the same meaning and intent, with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court, and make it the mere reflex of the popular opinion or passion of the day. This Court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it; and it must not falter in the path of duty!" Would to God it had not faltered in the path of duty, that it had been true to those higher and graver trusts! Would that it had not been the mere reflex of popular opinion or the passion of the day, that it had not abrogated its judicial character! Would that it had read the plain words in the holy spirit in which they were written! Would that it had left the Constitution as it was, and, instead of thus writing its own condemnation, had shown how efficient an instrument that Constitution would be, if fearlessly used to carry out the great principles of humanity for which its preamble declares it was established!

Here is the key to the new distinction between the Constitution as it is and the Constitution as it was. But as it was in the beginning, so it is and shall be.

But Taney could not stop here. Compromises had been made through the other branches of the government, — compromises held sacred for more than a generation, in the vain hope to appease the insatiate lust of the Slave Power. He went on with a longer and lower argument to declare one branch of the Compromise — the act of Congress prohibiting slavery in territory north of 36° 30′ — void.

Even more, — for he seemed determined to make clean work of it, — he went on to say that a slave who had been made free by being taken (not escaping, but by being carried by his owner) to a Free State was reduced to slavery again on arriving back in the State from which he had been taken, and that that was the result of Strader *vs.* Graham, which declared that the *status* of persons, whether free or slave, depended on the State law. Here, again, he sacrificed his cherished party principles to his love for Slavery. Else how could the State to which the slave had been carried be deprived of its right to enfranchise, or how could the United

States power be extended further than to the expressly granted case of escape?

But no. He was a judicial Calhoun. His dogma was that the fundamental law guaranteed property in man. He declared that therefore Congress could not interfere with it in the Territories. Before he was judge, he admitted the right of sojourn. There was but one step more, — the sacred right of slave property in Free States. It was involved in what he had already said, and was not so great an anomaly as he had already sanctioned; for if the Constitution guarantees this property in every State, — if the States do not reserve the power to interfere with it, — if, in case of escape, Congress has the power to reclaim it, — why is not the owner to be guaranteed it in the States as well as in the Territories?

In looking across this long judicial Sahara of twenty-seven years, there is but one oasis. In the Amistad case, the Court did declare that Cinque and the rest, who had been kidnapped, had the right to regain their natural liberty, even at the cost of the lives of those who held them in bondage; and for once the Court, speaking by Story, did appeal to the laws of nature and of nations, and decide the case "*upon the eternal principles of justice.*" But all else is, in the light of this question of Slavery, by which this age will be remembered and judged, a dreary, barren waste of shifting, blinding, stifling sand.

History will tell whether America is to be judged by the words spoken by him who so long held the highest seat in her courts. We do not think she has fallen to such a depth. He did not speak for her; but he did for himself.

By this record will the world judge Chief Justice Taney. His great familiarity with the special practice; his knowledge of the peculiar jurisdiction of his tribunals; his acquaintance with the doctrines and decisions of the common law, with equity and admiralty; his opinions on corporate and municipal powers and rights, on land claims, State boundaries, the Gaines case, the Girard will, on corporations; his decisions on patent-rights and on copyrights; his opinions extending admiralty jurisdiction to inner waters, on liability of public officers, and rights of State or national taxation, on the liquor and passenger laws, on State insolvent laws, on commercial questions, on belligerent rights, and on the organization of States, — after doing service for the day in the mechanical branch of his craft, will soon be all forgotten. But the slavocrats' revolution of the last two generations, and the Secession war, and the triumph of Liberty, will be the theme of the world; and he, of all who precipitated them, will be most likely, after the traitor leaders, to be held in infamous remembrance; for he did more than any other individual, — more than any President, if not more than all, — more in one hour than the Legislature in thirty years, — to extend the Slave Power. Indeed, he had solemnly decided all and more than all that President Buchanan, closing his long political life of servility in imbecility, in December, 1860, asked to have adopted as an "explanatory amendment" of the Constitution, to fully satisfy the Slave Power. Well would it have been for that Power, for a while at least, had its members recollected that "no tyranny is so secure, none so remediless, as that of executive courts"; well for them, — if it is better to rule in hell than serve in heaven, — but worse for the world, had they been patient. But the dose of poison was too great. Nature relieved itself. War came, not the ruin, but the only salvation, of the state.

The movements of events have been so rapid, the work of generations being done in as many years, that Taney's character is already historic; and we can judge of it by his relation to the great event which alone will preserve it from oblivion.

In judging his public character as the head of the Judiciary of America, consider the *cause* he sought to promote, his motives, the means he used, his resources as a jurist and a lawyer in that cause, the intended effect and actual results.

And of the cause this must be said and agreed by all, that there was never one of which a court could take cognizance in America, England, or the world so utterly evil and infamous as that of Slavery in the United States. Did he realize its extent? Yes, there were "few freedmen compared with the slaves," say only sixty thousand out of seven hundred thousand in 1789. He fully realized that, in repudiating the promise made for those seven hundred thousand, a pledge made with the most solemn appeal to man and to God, he utterly destroyed the rights and hopes of four million men. He knew he was deciding, for a vast empire, weal or woe; and he knew it was woe, or he had no sense of justice.

And his motives? He was not venal, not corrupt, not a respecter of persons. But there is something bad besides venality, corruption, and personal partiality. The worst of motives is disposition to serve the cause of evil. The country knows, the world will declare, none served it so well. But was he conscious of serving it? Yes, — unless the traitors so eagerly sought to put all these interests under his jurisdiction without motive, — unless his eager and unnecessary, and, as was declared and is now agreed, assumed jurisdiction over it, his "far-seeing" care and untiring defence of them, their appeal to his decisions, were all mistakes, — unless all these, and his manner, their motives, and the assured results, coincided so as by the law of chances was impossible, — he was conscious. To deny it is to say that he was imbued with the spirit of evil.

The world knows by what means he assumed to settle these questions. We have seen something of the nature of his arguments. With these, too, men are somewhat familiar, and by these let them judge of him as a jurist.

There is not in them all one faint recognition of the axioms of law, — one position founded on the laws of nature or the rules of eternal justice and the right, — one notice of the great primal rules laid down by all jurists and great judges of ancient and modern times, or of the precepts of religion by which any magistrate in a Christian land must expect to be governed, or to be held infamous forever. Nay, more: he does not recognize at all those fundamental principles of the Constitution and Declaration which are stated in plain terms in the first lines of both. He did worse than torture and pervert language: he reversed its meaning. He denied the undoubted facts of history. He denied the settled truths of science. He slandered the memory of the founders of the government and framers of the Declaration. He was ready to cover the most glorious page of the history of his country with infamy, and insulted the intelligence and virtue of the civilized world.

Where, outside his "*axiom in morals and politics*," can be found so monstrous a combination of ignorance, injustice, falsehood, and impiety? Ignorant of the meaning of an "axiom"; denying the truths of science; falsifying history; setting above the Constitution the most odious theory of tyranny, long before exploded; scoffing at the rules of justice and sentiments of humanity, — he tied in a knot those cords which must end the life of his country or be burst in revolution.

He well knew, too, what would be the effects of his decision. Avowedly he was ready to lay the time-honored principles of civil right and the ancient law at the feet of the Slave Power. The passions of a mighty people never raged more fiercely than whilst that last cause was before his court, — save in open war; and there was almost war then. He well knew nothing would so force them to desperation, — the desperation of unlicensed barbarism or the immovable determination of truth and justice driven to the wall. He knew, or if he did not, was so ignorant that he was incompetent, that in such a contest on such fundamental principles, such a decision must end in revolution and civil war. If he dreamed of peace, then he was ready to seal the doom of four million, and at the end of this century of ten million souls.

In all these decisions he appeals to

no one great principle. There is little in all his judgments to raise him above the rank of respectable jurists; and in these, presenting the fairest occasion ever offered to a true lawyer, to one fit to be called an American, nothing that will not cover his name with infamy, where, on far lesser occasions, Hale and Holt, Somers and Mansfield, covered theirs with honor, and added to the glory of their country, and did good to mankind.

He was not, indeed, of that class of the bad to which the profane Jeffreys and Scroggs and the obscene Kelyng belong. But he was as prone to the wrong as was Chief Justice Fleming in sustaining impositions, and Chancellor Ellesmere in supporting benevolences for King James; as ready to do it as Hyde and Heath were to legalize "general warrants" "by expositions of the law"; as Finch and Jones, Brampton and Coventry, were to legalize "ship-money" for King Charles; as swift as Dudley was under Andros; as Bernard and Hutchinson and Oliver were in Colonial times to serve King George III.; as judges have been in later times to do like evil work. Some of these, perhaps, had no conscious intent to do specific wrong. Their failure was judicial blindness; their sin, unconscious love of evil. But this question of Slavery towers above all others that Taney ever had to consider; America professed a loftier standard of justice than England ever adopted; the question of the liberty of a race is more important, the question whether the State is founded on might or on right is more vital, than those of warrants and ship-money, benevolences and loans; and Roger Brooke Taney sinks below all these tools of Tyranny.

Hobbes said, that, "when it should be thought contrary to the interest of men that have dominion that the three angles of a triangle should equal two right angles, that truth would be suppressed." Taney did deny truths far plainer than that, — the axioms of right itself. He did more than any other man to make actual that awful picture of the Great Leviathan, the Mortal God. How just, how true, were those last symbols of the State founded on mortal power! The end of the dread conflict of battle is the same as the end of the equally dreadful issue of the Court.

But those he served themselves with the sword cut the knot he so securely tied; his own State was tearing off the poisoned robe in the very hour in which he was called before the Judge of all. America stood forth once more the same she was when the old man was a boy. The work which he had watched for years and generations, the work of evil to which all the art of man and the power of the State had been subservient, that work which he sought to finish with the fatal decree of his august bench, one cannon-shot shattered forever.

He is dead. Slavery is dying. The destiny of the country is in the hand of the Eternal Lord.

THE MANTLE OF ST. JOHN DE MATHA.

A Legend of "The Red, White, and Blue," A. D. 1154–1864.

A STRONG and mighty Angel,
Calm, terrible, and bright,
The cross in blended red and blue
Upon his mantle white!

Two captives by him kneeling,
Each on his broken chain,
Sang praise to God who raiseth
The dead to life again!

Dropping his cross-wrought mantle,
"Wear this," the Angel said;
"Take thou, O Freedom's priest, its sign, —
The white, the blue, and red."

Then rose up John de Matha
In the strength the Lord Christ gave,
And begged through all the land of France
The ransom of the slave.

The gates of tower and castle
Before him open flew,
The drawbridge at his coming fell,
The door-bolt backward drew.

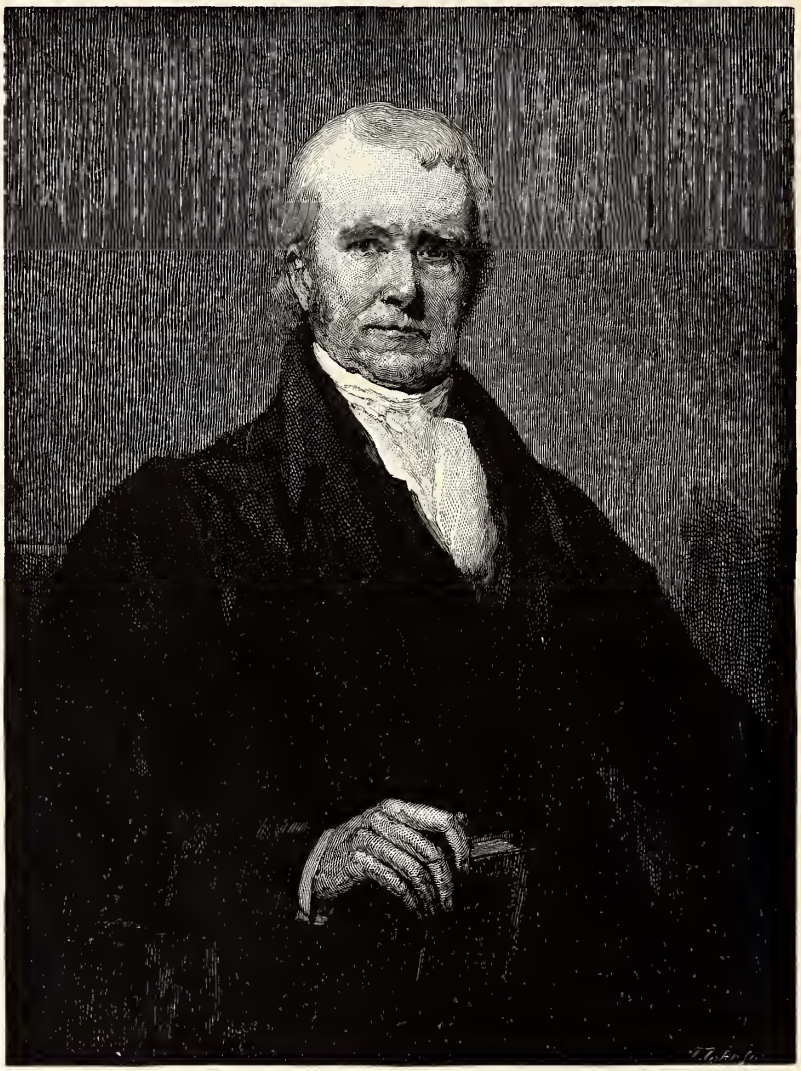
For all men owned his errand,
And paid his righteous tax;
And the hearts of lord and peasant
Were in his hands as wax.

At last, outbound from Tunis,
His bark her anchor weighed,
Freighted with seven score Christian souls
Whose ransom he had paid.

But, torn by Paynim hatred,
Her sails in tatters hung;
And on the wild waves, rudderless,
A shattered hulk she swung.

"God save us!" cried the captain,
"For nought can man avail:
Oh, woe betide the ship that lacks
Her rudder and her sail!

1583 · Supreme Court



J. Marshall

THE CENTURY MAGAZINE.

VOL. XXV. DECEMBER, 1882. NO. 2.

THE SUPREME COURT OF THE UNITED STATES.

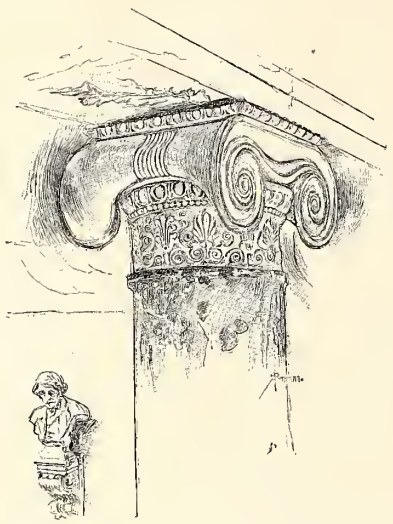
THE Supreme Court is the balance-wheel of government in the United States. It does its work so quietly, and its operations touch the lives and business affairs of so few citizens, that much less is known about it than about any other portion of the Federal machinery. Rarely do its proceedings attract public attention; yet it may be truly said to be the conservative force in our political system, holding all the parts together and keeping each in harmony with the plan of the whole. We are apt to think ours a simple system; it is in reality a complicated one, for we have both a divided and a concentrated sovereignty, and the functions of authority are distributed between the state and the nation, and among different departments of each, in such a way that innumerable conflicts would occur to strain and perhaps finally destroy the framework of popular government, were it not for the regulating power of the supreme judicial tribunal. On several occasions in the history of the Great Republic, the power of the Supreme Court has been more than regulative, and has assumed a formative character. In its early stages especially, the form itself of the central government was largely shaped by the decisions which came from the Supreme Bench, interpreting the Constitution, then an elastic compact, not hardened by time and use, and one of untried and doubtful force as a bond to hold the States together and create from them a homogeneous nation.

The visitor in Washington is likely to be more favorably impressed with the Supreme Court than with any other feature of government he sees. The House is a turbulent town-meeting held on a velvet carpet. The Senate, which used to be sedate and courteous, is fast falling into the bad manners of the lower branch of Congress. Speeches are rarely listened to, and there is a general appearance of lounging inattention, varied only by letter-writing or conversation, carried on under the very nose of the senator who is on the floor, seeking to influence the judgment of his associates. The White House is a business office, with a few showy rooms for formal receptions, and the President is approached like the head of any important business concern, with little more ceremony than is observed in a bank or a railroad office. The Supreme Court seems, by its quiet and stately dignity, to typify more fitly the power of a government which holds the lives and fortunes of fifty millions of people in its keeping.

Midway in the rather dingy and ill-lighted passage that leads from the great rotunda of the Capitol to the Senate wing sits a colored man holding a cord attached to the handle of a closed door. If you pause, as if desirous of entering, he pulls the cord; the door opens and you are in a narrow vestibule. Another door swings inward silently, and another colored man politely motions you to a seat on the crimson cushions of a big sofa. A high screen in front of the door hides the room from you when you first enter, but once on the sofa you find that you are in the Supreme Court chamber. Suppose it to be a few moments before noon. The long row of big, easy-chairs, on a high platform back of a desk of equal length, are still vacant, for the court meets at twelve. You have time to study the room. Its form is that of a semi-circle, with a half-dome for the ceiling, pierced by sky-windows, through which a mild light falls on crimson curtains and upholstery, and on the pleasant gray tint of the walls. A small gallery over the judges' seats is supported by pillars of the peculiar mottled gray and black stone called Potomac marble, and pilasters of the same stone relieve the circling sweep of the wall. Behind the pillars and under the gal-

lery there are heavily curtained windows, and a screened passage leading to the retiring-room of the judges on one hand, and to the marshal's office on the other. Upon the wall are busts of the six Chief-Justices who preceded the present incumbent,—Jay, Rutledge, Ellsworth, Marshall, Taney, and Chase. The greater part of the floor-space is railed off for the members of the bar. Outside of this are the sofas for spectators—the only really comfortable seats for public use to be found in the Capitol. The gallery is never used now. Only once, since the Senate left the room to go to its new chamber in the north wing of the building, has it been tenanted. That was during the sessions of the Electoral Commission which disposed of the Presidency during the memorable winter of 1877. Then the reporters for the press were squeezed day after day into its narrow limits.

When twelve o'clock comes, there are perhaps a dozen lawyers sitting at the tables within the bar, and a score of spectators waiting on the crimson plush sofas for the court to open. A rustle of silk is heard from the open door leading to the retiring-rooms.



DETAIL OF IONIC CAPITAL IN THE SUPREME COURT CHAMBER.

At the other side of the chamber sits a young man at a desk, who has been listening for a few minutes for that sound. He rises, and announces in a clear voice: "The Honorable the Chief-Justice and Associate-Justices of the Supreme Court of the United States," whereupon lawyers and spectators all get up on their feet. The rustling sound approaches, and there enters a procession of nine dignified old men, clad in black silk gowns that reach almost to their feet, with wide sleeves and ample skirts. At the head walks the Chief-Justice, and the others follow in the order of their length of service in the court. They stand a moment in front of their chairs, and all bow at once to the bar. The lawyers return the salute; then the judges sit down, the Associates being careful, however, not to occupy their chairs before the Chief-Justice is settled in his. Now the young man, who is the crier, exclaims, in a monotonous fashion:

"Oyez! oyez! oyez! All persons having business before the Honorable Supreme Court of the United States are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable court!"

Business begins promptly and is dispatched rapidly. First, motions are heard, then the docket is taken up. The Chief-Justice calls the case in order in a quiet tone, and a lawyer is on the floor making an argument, while you are still expecting that there will be some further formality attending the opening of so august a tribunal.

The proceedings are impressive only from their simplicity. Usually the arguments of counsel are delivered in low, conversational tones. Often the judges interrupt to ask questions. In patent cases, models of machinery are frequently used to illustrate an argument, and are handed up to the judges for examination, or a blackboard is used for diagrams. Were it not for the gray hair and black gowns of the judges, you might almost imagine at times that the gentleman at the blackboard, with crayon in hand, was a college professor lecturing to a class. Or you may happen in when a lawyer in charge of a case is leaning over the long desk in front of the judges, holding a conversation with one of them on some intricate point in a mechanical device, and you would hardly think that the court was in session and that the conversation was the plea in a patent case involving perhaps a million of dollars.

The bench has long been only a tradition in all our courts. Each justice of the Supreme Court has a chair to suit his own notions of what constitutes a comfortable seat. Some of the chairs have high backs to rest the head, some have low backs; some have horse-hair cushions, some velvet, some no cushions at all. Chief-Justice Waite sits in the middle of the row. At his right is the Senior Associate-Justice, Samuel F. Miller, of Iowa; at his left the next in rank, Stephen J. Field, of California. Then right and left, alternately, are Justices Joseph P. Bradley, of New Jersey, John M. Harlan, of Kentucky, William B. Woods, of Georgia, Stanley Matthews, of Ohio, Horace Gray, of Massachusetts, and Samuel F. Blatchford, of New York. Justices

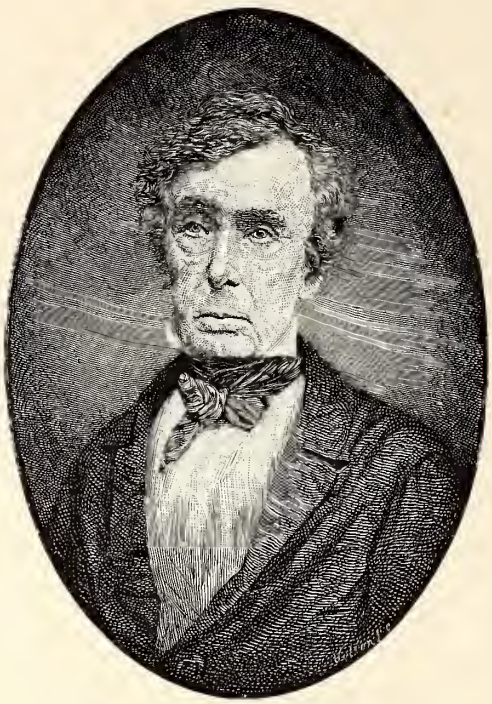
JOHN JAY. (AFTER THE BUST BY JOHN FRAZEE.)

Miller and Field were appointed by President Lincoln,—the former in 1862, and the latter in 1863. Bradley was appointed by President Grant in 1870, and the Chief-Justice by the same President in 1874. Harlan, Woods and Matthews were appointed by President Hayes; but Matthews's nomination was not acted on by the Senate until Hayes's term expired, and he was renominated by President Garfield, and thus represents two administrations. Gray and Blatchford are the nominees of President Arthur.

There is a tradition that the justices wore red gowns in the early days of the court. One of the present justices, who is an authority on the history of the court, says that it is a mistake arising from the fact that the first Chief-Justice, John Jay, in the portrait that hangs in the consultation-room, wears a robe with broad scarlet facings, and collar and sleeves of the same color. This gown was borrowed by Jay of Chancellor Livingston, and when the court determined upon a costume, it was a plain black silk gown just like that now worn. In the higher tribunals of the States, scarlet gowns were worn in many instances as late as the second decade of the present century. The first Judges of the Supreme Court did not adopt any peculiar fashion of wig as a mark of their office. The English judicial wig was in vogue in the State courts; but the short wig, or the plain pig-tail, appears to have been the head-gear worn by Jay and his associates. At all events, when Cushing, who was one of the members of the original court, arrived in New York, and put on the big wig he had worn on the Massachusetts bench to go to the first meeting, he was followed up Broadway by a mob of boys, who pointed at his extraordinary attire, but otherwise showed him no disrespect. To avoid being so unpleasantly conspicuous, he hastened to a shop and bought a peruke of the then current fashion.

Every Saturday, during a term of the court, the justices meet in the consultation room to decide cases. The room is a cheerful, old-fashioned apartment, with windows on two sides, looking toward the Senate and the city. The carpet dates back to 1860, but it looks as fresh and whole as if it had enjoyed the care of an economical housewife in the little-used parlor of some New England country-house. The chairs are of rose-wood and hair-cloth, and of an indescribable fashion,—a cross between an ancient ottoman and the curule chair of a Roman senator. On the walls hang portraits of Marshall, Jay, and Taney. The arguments of the justices, when they assemble by themselves in this room, are often more thorough and able than those heard from the lawyers in the court. All the cases must be examined by all the justices; but when a decision is reached, the Chief-Justice designates the justice who is to write the opinion. Opinions are read and approved in the consultation room before they are delivered in open court. If there is disagreement, the dissenting judges arrange among themselves as to the preparation of their opinion. It is voluntary on their part, and not the business of the court.

The business of the Supreme Court is divided into two general classes,—cases in which it has original jurisdiction, and cases which come to it by appeal from the lower courts. If a citizen of the United States wants to sue a foreign minister or consul for debt, he cannot have recourse to any State tribunal, but must go directly to the Supreme Court. The secretaries and attachés of foreign ministers, and even their servants, are included in the immunity from ordinary processes of law, the house of the minister being, theoretically, foreign territory, and its inmates under the protection of the flag of the foreign country represented by the legation. To invade this sacred domain nothing suffices but the process of the highest court



ROGER B. TANEY. (FROM A PHOTOGRAPH BY BRADY.)

of the land. If, therefore, the pastry-cook of the Peruvian Minister should fail to pay a grocer's bill, the only way to collect it by legal constraint would be by invoking the power of the Supreme Court. In like manner, a minister or consul can go to the same tribunal to prosecute a suit against any citizen, the constitutional provision on the subject working both ways. It is to the credit of foreign representatives residing in this country that it has rarely been invoked. Another class of cases in which the court has original jurisdiction embraces suits of one State against another State, or of a State against a citizen of another State. Where a State is called upon to respond to the complaint of another State, a subpœna is served upon the governor and attorney-general of the responding State, by the marshal of the court, and the attorney-general appears and makes answer. What would be done if in such a suit a decision for damages were rendered, and the State beaten in the litigation should refuse to pay, is an un determined question touching the theories of State rights and sovereignty. Could the marshal levy upon a state house or other tangible property of the defendant and sell it at auction? No case has arisen in which the power of the court to recover a money judgment against a State has been tested.

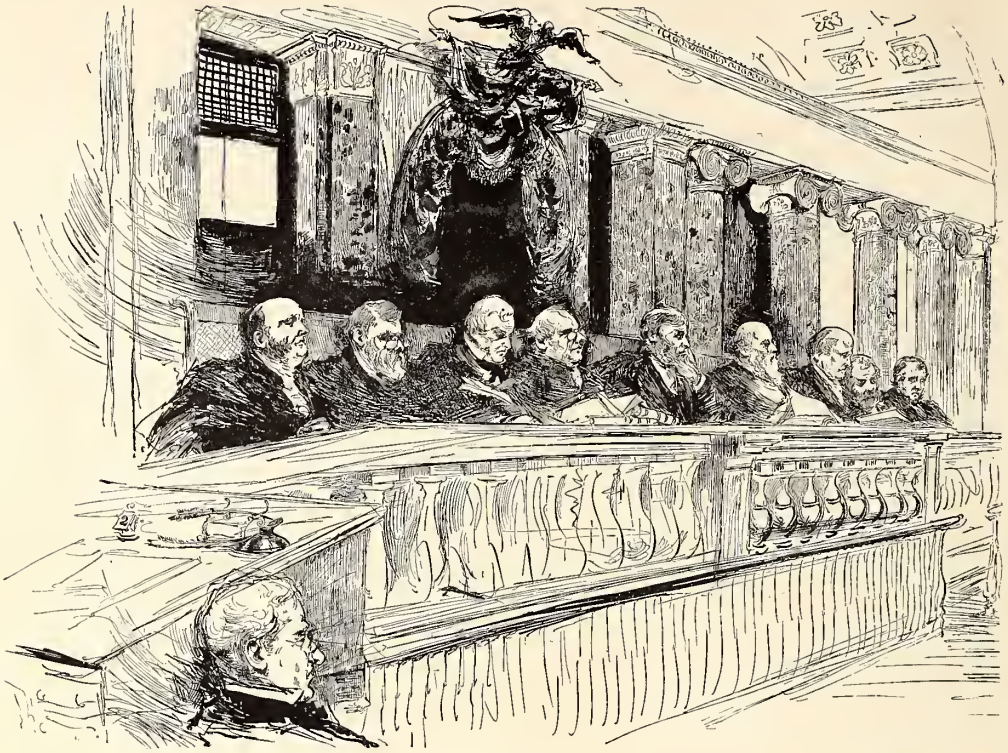
A State may sue a citizen or citizens of another State; but a citizen cannot sue a State—an injustice growing out of the old English common law maxim that the king can do no wrong. Thus, Georgia may sue a citizen of New York before the Supreme Court for breach of contract or debt, but the citizen cannot sue Georgia to recover the money she owes him on a repudiated bond. Under the constitution as first adopted, a State was responsible for her debts. One of the earliest decisions of the Supreme Court, which may still be read in fair round hand in the first record book of the court, established this principle. The case was Chisholm, executor, against Georgia; and John Jay, the first Chief-Justice, decided that a State could be sued the same as a corporation. This was considered the most ultra form of Federalist doctrine, and the States' rights people made such an ado about it that Congress hastened to adopt a constitutional amendment providing that "The judicial power of the United States shall not extend to suits against a State by a citizen of another State or a foreign State." That was in 1793. Ever since a State can be as dishonest toward individuals as she pleases, while holding them to strict accountability in their dealings with her. The question of State accountability is shortly to come up in a new form. Certain citizens of New Hampshire, holding repudiated bonds of Louisiana, have transferred them to their own State, and New Hampshire has brought suit upon them before

the Supreme Court. If the court holds the transfer to be valid and gives judgment against Louisiana, then the way will be open for all the defrauded creditors of defaulting States to get their money.

Still another class of business where the court has original jurisdiction is habeas corpus cases, affecting persons in jail by the operation of United States laws. Applications for habeas corpus writs may be made directly to any justice of the Supreme Court, but generally a Circuit judge is first applied to. If he remands the prisoner, then the case can be taken before the Supreme Court, and a writ of certiorari brings up the record of the proceedings in the inferior tribunal. A fourth and last class of original business is applications for what are called writs of prohibition. If an inferior court is believed to be going beyond its powers and jurisdiction, the Supreme Court may be applied to for a writ ordering it to stop proceedings. It is a curious fact, and one showing how carefully courts in this country keep within their proper sphere of action, that no such writ has ever been granted. There have been a few applications, but in no case was there shown to be sufficient ground for the interference of the supreme judicial power.

A very large majority of the cases tried before the Supreme Court come under its appellate powers. Cases decided by State courts of last resort, which involve what are called federal questions, that is, questions arising under United States statutes or treaties, may be taken to the Supreme Court on writs of error. The method is to file a petition alleging that a federal question is involved in the case. If the highest State tribunal refuses to grant the writ, any justice of the Supreme Court has the power to do so. It is said that the Virginia courts never assent to the transfer of cases to the Supreme Court on any showing whatever—holding the State judiciary to be equal to the Federal judiciary, and not subject to review. The interference of the Supreme Court is therefore necessary in all cases where writs of error are demanded in that commonwealth. When a writ of error is issued, it is signed by one of the justices and sent to the clerk of the State court, who makes up a full transcript of the record of proceedings in that court and all inferior tribunals through which the case has gone, including pleadings, testimony, and such evidence as is necessary, and sends them to the Clerk of the Supreme Court. A citation is served upon the "defendant in error," who is, of course, the party that won the suit in the State courts; the "plaintiff in error" must file a bond to indemnify the defendant for any damage he may suffer by the delay caused by the appeal, in case it is shown that there is no federal question involved. A member of the Supreme Court bar appears for the appellant, and the case is then docketed to await its turn. Writ of error cases also come up from the Circuit courts of the United States.

Much the largest class of cases decided by the Supreme Court come up from the lower Federal tribunals. Any one can appeal his case from a Circuit court to the tribunal of last resort, provided the sum involved exceeds five thousand dollars. This right of appeal is absolute, and does not depend upon consent of the Supreme Court, as in writs of error to State courts. It extends also to the Federal District Courts of West Virginia and Mississippi, which, by special statute, have Circuit court powers; and a statute applicable only to California permits special land cases to skip the Circuit Court and come directly to Washington from the District Court of that State. An application for an appeal is made to the judge of the lower court, and a single paper signed by him is all the formality required. The counsel for the appellant has the record made out and sent to Washington, and the case goes at once upon the docket. Thus, the only limit to the power of the litigants in the Federal courts to carry their disputes up to the highest tribunal in the country is a money limit. It costs very little to get a case tried, except for counsel fees. All the Supreme Court expenses amount to only about twenty dollars for each side, besides the cost of the record, which is taxed at the rate of twenty cents per hundred words. Justice, as administered by the Supreme Court, is cheaper than in many inferior tribunals, and is made expensive only by the bills of the lawyers, who often, no doubt, make clients believe that to present a case to that august bench of judges is so serious, exacting, and solemn an affair, that their services can be compensated for only by a large fee. The fact is that, in most cases, the point at issue is so narrowed down by the time it comes up before the court, that a few minutes' direct common-sense talk in explanation of a brief is all that a wise lawyer attempts in making an argument, and all that the court will listen to patiently. The court is a bad place for a pretentious display of legal learning, or a flourish of oratory. The most successful advocates who practice at its bar are those whose style is most condensed and lucid, and who never travel away from the essential matter in controversy. They no doubt remember the anecdote of Chief-Justice Marshall—an anecdote, by the way, which has been tacked on to many eminent judges, but which Marshall's



THE SUPREME COURT

biographers claim as belonging to him. A pompous and tedious advocate was rehearsing well-known and undisputed rules of law, when the Chief-Justice interrupted him, and said, "Mr. C., I think this is unnecessary. There are some things which a court, constituted as this is, may be presumed to know."

Not always, even in recent times, however, have the lawyers confined their speeches to the clarified common sense and direct logic which judges like to hear. Now and then the court is forced to listen to flights of rhetoric which bring half-amused and half-impatient looks to the faces of the justices. Here, for example, is a specimen of florid eloquence with which, not many years ago, a lawyer opened his brief in an important writ of error case. The brief is still shown as a curiosity in the office of the clerk of the court:

"May it please the Court: When the 'bonnie blue flag' went down before the 'star-spangled banner,' and that glorious emblem of 'the Union, the Constitution and the Enforcement of the Laws,' again waved in triumph

'From Maine's dark pines and crags of snow
To where magnolian breezes blow,'

it was fondly hoped that civil strife and contention were at an end, and that peace, quiet, and repose had returned to bless the land.

"But these were

'Hopes which but allured to fly;'

they were, indeed, but

'Joys that vanished whilst we sipp'd.'

GRAY. WOODS. BRADLEY. MILLER. WAITE (CHIEF-JUSTICE).

THE PRESENT JUSTICES

IN SESSION.

"For scarcely had the roar of artillery ceased and the smoke of battle cleared off, and scarcely had the ink become dry on the parchments of pardon which fell from the executive hand,

'Thick as autumnal leaves that strew the brooks
In Vallombrosa,'

before some

'Of the last few, who, vainly brave,'

and who would theoretically, merely,

'Die for the cause they could not save,'

rushed into the courts, renewed the contest in another form, and we are here to-day on a writ of error to the Supreme Court of Louisiana, to reverse a victory obtained in this new mode of hostility and attack upon the power and authority of the United States, and the rights of one which are firmly based upon the same."

We have already glanced at the marble busts of former chief-justices which look down from the walls of the Supreme Court room. One of them, Rutledge, held the office only during a recess of Congress, and was never confirmed by the Senate; so his term was limited to a single session of the court. There was a seventh, William Cushing, of Massachusetts, who was promoted from an associate-justiceship to be chief-justice, and was duly confirmed, but resigned before holding a term of the court. It may fairly be asked whether Cushing is not as much entitled to a place among the chief-justices as Rutledge, whose title to the office was never completed.

FIELD.

HARLAN.

MATTHEWS.

BLATCHFORD.

SEAL.

OF THE SUPREME COURT.

The first of the chief-justices was John Jay, of New York, who came to the bench when the court was first organized, after a remarkable career in the politics, legislation, and diplomacy of the revolutionary period. He was only forty-four when Washington placed him at the head of the Federal judiciary. The first congress under the constitution met in the spring of 1789, the House getting a quorum April 1st and the Senate April 6th, and the President coming up to New York on the 23d, in a barge rowed by thirteen pilots in white jackets. Congress was very slow in passing the necessary measures to set the new government in operation, and it was not until September 24th that the judiciary bill was adopted. It created District and Circuit courts. and a Supreme Court to consist of a chief-justice and five associate-justices. Washington had previously offered Jay a choice of offices under the Government, and Jay selected the chief-justiceship as most in accordance with his tastes. He was nominated September 26th, 1789, and his associates were: William Cushing, of Massachusetts, James Wilson, of Pennsylvania, John Blair, of Virginia, Robert A. Harrison, of Maryland, and James Iredell, of North Carolina. The court did not meet until February, 1790, when three of the justices assembled in New York, only to find that there was no business for them to transact.

At the next sitting, the following day, Justice Blair was present, and the letters-patent, as official commissions were then called, appointing the members of the court, were "openly read and published in court." No other business was done, save to appoint Richard Wenman crier. On the third it was ordered "that John Tucker, Esq., of Boston, be the clerk of this court, that he reside and keep his office at the seat of the National Government, and that he do not practice either as an attorney or a counsellor in this court while he shall continue to be clerk of the same." A seal was adopted, consisting of the "arms of the United States, engraven on a circular piece of steel of the size of a dollar, with these words on the margin, 'Seal of the Supreme Court of the United States.'"

There was a court now, with officers and a seal, but there was no bar. On the fifth of February, the minutes show that Elias Boudinot, of New Jersey, Thomas Hartley, of Pennsylvania, and Richard Harrison, of New York, Esquires, were severally sworn as by law required, and admitted counsellors of the court, and a rule was made that "it shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the Supreme Courts of the State to which they respectively belong, and that their private and professional character shall appear to be fair." Thus the beginning of a bar was made, and afterward the lawyers came in fast enough. Three days later eleven were admitted, among them Fisher Ames and Robert Morris. The English distinction between counsellors and attorneys was observed, and the two classes are carefully separated upon the records of the court.

On the third of March the court was reinforced by the arrival of James Iredell, so that there were four associate-justices sitting with Chief-Justice Jay. The fifth associate, John Rutledge, of South Carolina, did not attend this or any subsequent sessions of the court until he took his seat as Chief-Justice after the resignation of Jay.

The court was now fully equipped with a bench, a numerous bar, and a set of rules, but there were no cases to try. On the tenth of February it adjourned until the second of August. The justices went off to attend the Circuit Courts. When they re-assembled there was still no business beyond the admission of more counsellors and attorneys, and providing seals for the Circuit Courts; so another adjournment was had until the seventh of February, 1791. The Government, meanwhile, had left New York and gone to Philadelphia, and the court followed it. Still there was nothing to do beyond directing special terms of the Circuit Court to be held in New York and Philadelphia, to try persons accused of smuggling and other crimes against the federal laws. The first case that came before the Supreme Court is entered on the minutes as "Nicholas and Jacob Vanstaphorst *vs.* State of Maryland," and the first arguments of counsel which the court heard were on the question of the validity of a writ of error from the Circuit Court for the Rhode Island district. William Bradford, Attorney-General of Pennsylvania, made the argument for the plaintiff, and David L. Barnes for the defendant. The first opinions read were in the case of the State of Georgia *vs.* Brailsford *et al.*, and it is interesting to note that there was a division among the judges at the very threshold of their new duties. The case came up on a bill in equity, filed by Edward Telfair, Governor of Georgia, against Samuel Brailsford and three others, and it involved the sum of £7058 9*s.* 5*d.*, which one James Spalding owed the defendants. Spalding was a tory, and his estate had been confiscated by the State. Brailsford was a British subject. In some way, Spalding had saved a portion of his property from the clutches of

the authorities, and long after the war closed his British creditors sued him and recovered judgment in the Circuit Court. His property had been sold by the marshal to satisfy the judgment, when the State stepped in and

OLIVER ELLSWORTH AND WIFE. (AFTER THE PAINTING BY R. EARLE, 1792.)

demanded the money. The injunction asked was to prevent the marshal from paying over the money to the creditors before the question of the right of Georgia to it could be judicially decided. Chief-Justice Jay, and Justices Iredell, Blair, and Wilson, read opinions in favor of granting the injunction, and Justices Johnson and Cushing in opposition.

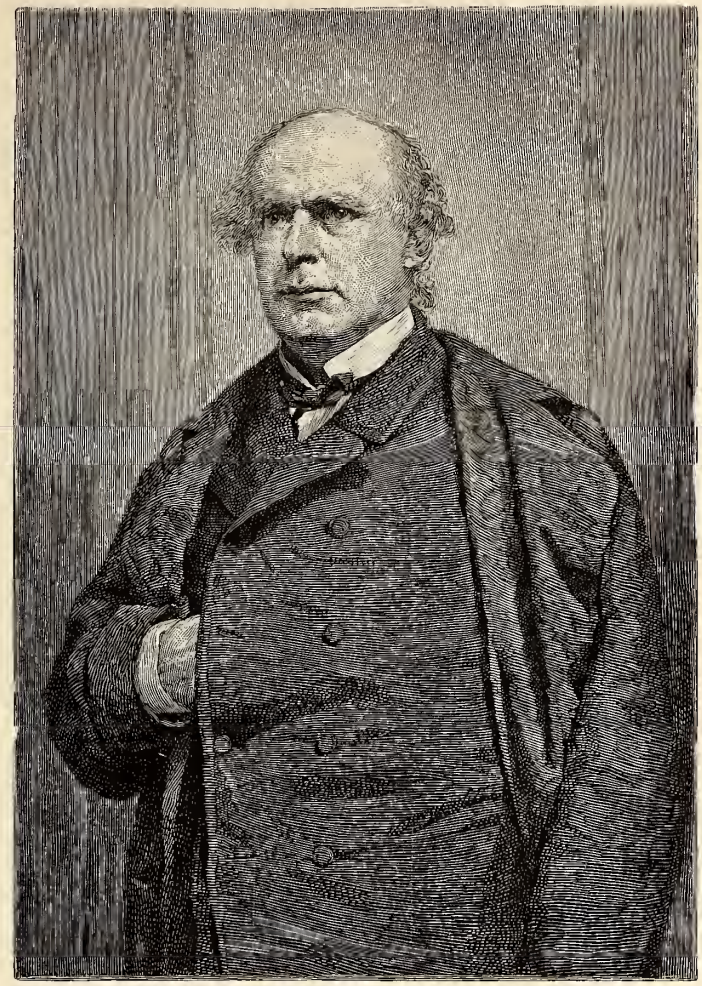
It is noticeable that nearly all the early cases are suits against States by citizens of other States, which were all disposed of by the Eleventh Amendment to the Constitution, adopted in 1798, after Chief-Justice Jay's decision in the suit of Chisholm against Georgia, holding such cases to come within the jurisdiction of the courts, had stirred up Congress to protect the theory of State sovereignty and immunity from having their acts questioned by individuals. For several years subsequently the court found very little business to transact. In 1801, when John Marshall was appointed Chief-Justice, the number of cases awaiting adjudication was only ten, and during the five following years the average was only twenty-four a year. In the period between 1826 and 1830, the aggregated number of cases was two hundred and eighty-nine, or an average of fifty-eight a year. When Taney succeeded Marshall as Chief-Justice in 1836, the number on the docket was only thirty-seven. During the next twenty years the increase was gradual. From 1850 to 1855 the average was seventy-one a year, and the court was able to dispose of its docket by working three months. Of late the increase has been very rapid. From 1875 to 1880 the average number of new cases per year was three hundred and ninety-one, and over one thousand cases are now on the docket awaiting a hearing.

There are probably few lawyers, even, if asked whether a jury trial could be held in the Supreme Court, who would answer in the

affirmative. Yet there were once juries empaneled in that tribunal and cases tried before them, and there is nothing in the statutes now operative to prevent such trials in cases where the court has original jurisdiction, and in which questions of fact are involved. For example, in a case of a foreign minister suing a citizen for debt, either party would have the right to demand a jury. In the early history of the court, juries were regularly empaneled, just as in inferior tribunals, to be ready for duty if their services were needed. The first mention of a jury in the oldest volume of minutes is under date of February 4, 1794. The court then sat in the City Hall, in Philadelphia, and the case tried was that of the State of Georgia against Samuel Brailsford. I have not been able to find the record of the last jury trial, and the information cannot be had from any of the present judges or the traditions of the court. Probably it was before the chief-justiceship of Marshall. The custom is supposed to have fallen into disuse soon after suits of individuals against States were barred by the XIth Amendment. No lawyer would now desire to submit a question of fact to a jury when he could have the verdict of a bench of nine eminent judges, unless, indeed, he hoped to gain his case by throwing dust in the eyes of justice,—a proceeding which it would be hazardous to attempt in the Supreme Court.

Chief-Justice Jay sat upon the supreme bench until 1794, when he went to England, to negotiate the treaty which is known in history by his name, and which made a great disturbance in the politics of the time. On his return in 1795 he resigned, to accept the governorship of New York, to which he had been elected during his absence. Ardent Federalist as he was, the governorship of a great State seemed to him a more exalted office than the Chief-justiceship of the United States. The Federal Government was new and untried, and its powers were hardly recognized or understood. He had been overruled by Congress in his attempt in the Chisholm case to destroy, in its incipiency, the theory of State's rights, by treating the States as mere corporations, which could be brought to book before the Federal judiciary, and he threw off the judicial robe gladly to take the helm of his own State, which he had served conspicuously and well during the stormy epoch of the war. He died in 1829, after several years of tranquil retirement upon his estate in Westchester County. A friend, observing the substantial nature of his buildings, and knowing his religious views, once remarked that Governor Jay, in all his conduct, seemed to have reference to perpetuity in this world and eternity in the next. Jay was a little less than six feet high. He had a colorless complexion, blue eyes, an aquiline nose, and wore his hair over his forehead and tied behind in a cue. He was gentle and unassuming in his manners, and had a vigorous, exact, logical mind. An Episcopalian in religion, he was an active churchman and a great Bible student. When on his estate, he rose with the sun, rode on horseback a great deal, was punctual and methodical in his habits, and never omitted to conduct family worship morning and evening. His face, as shown in the bust in the court-room, is one of strength rather than genius. The features have a classical regularity, and the head might well be taken for that of a Roman consul.

The second Chief-Justice was John Rutledge, of South Carolina, a typical Southern statesman, haughty, generous, impetuous, brave, and not always discreet. He, like Jay, had played a leading role in the Revolution. He had been a member of the first Continental Congress, then President of South Carolina from 1776 to 1778, Governor from 1778 to 1782, then a year in the first congress under the constitution. From Congress he went back to his State, served in its legislature, sat on the bench of the Equity Court, and was elected Chief-Justice of the Court of Common Pleas in 1791. Washington appointed him one of the Associate-Justices of the Supreme Court upon its first organization,—a position he seems not to have valued much, for he hesitated some time before resigning his place in the State judiciary, and did not attend the sessions of the Supreme Court in New York or its first meetings in Philadelphia. When Washington named him for Jay's place, in 1795, the friends of the Administration were surprised and offended. The struggles between the Federalists and the anti-Federalists—the strong-government men and the weak-government men—had already begun. Rutledge, although a personal friend of Washington, had identified himself with the anti-Federalist party. There was strong feeling at the time over the Jay treaty, in which the new republic sought the friendship of England and cut the ties of French sympathy. Rutledge belonged with Jefferson to the French party. The Federalists sharply criticised his appointment. Rutledge himself hastened to justify their assertions that Washington had made a serious mistake in selecting him for the chief-justiceship. He was in Charleston when the news of his appointment arrived. Almost at the same time came the details of Jay's treaty with England. Rutledge made a vigorous speech at a public meeting, denouncing the treaty, reckless of the fact that he was no longer a South Carolina poli-



SALMON P. CHASE. (FROM A PHOTOGRAPH BY BENDANN.)

tician, but the head of the Federal judiciary. It is said of Rutledge, by one of his biographers, that he exhibited every degree of courage, from that of a grenadier to that of a statesman. His speech on the Jay treaty was unquestionably courageous, but it showed only the grenadier type of courage, which cares nothing for consequences. It preceded him to the national capital, and added fresh fuel to the anger of the Administration party. "A driveler and a fool has been appointed to be Chief-Justice," exclaimed a member of Washington's cabinet. "Is faction to be courted at so great a sacrifice of consistency?" asked a Federalist senator. Congress was not in session when Rutledge reached Philadelphia, and he took his seat in the Chief-Justice's chair without waiting to be confirmed by the Senate. When Congress met, in December, the harsh feelings against him had subsided a great deal, and his friends had had time to urge in his behalf his brilliant services to the cause of American liberty during the Revolution; but a disease from which he had long suffered had begun to affect his mental faculties, and it was evident that he would soon become unfitted to hold a judicial office. So he was rejected by the Senate. He returned to South Carolina with the bitter feeling that the nation he had done so much to create had put a stigma upon him. He died in 1800, a mental wreck. One of the biographical sketches of him contains a hint about the "follies of the wise and the frailties common to mankind," from which we may infer that bad habits had much to do with the premature decadence of Rutledge's powers. He was only sixty-one when he died,—an age at which most public men are in the full maturity of their faculties.

The bust of Rutledge in the Supreme Court chamber is that of a singularly handsome

THE LATE D. W. MIDDLETON, CLERK OF THE SUPREME COURT. (FROM A PHOTOGRAPH BY SPINNER.)

man, with symmetrical features, large, eloquent eyes, a delicate, pleasure-loving mouth, and a rounded, rather woman-like forehead. The nose alone shows evidence of force of character. The type of face is rather French than English.

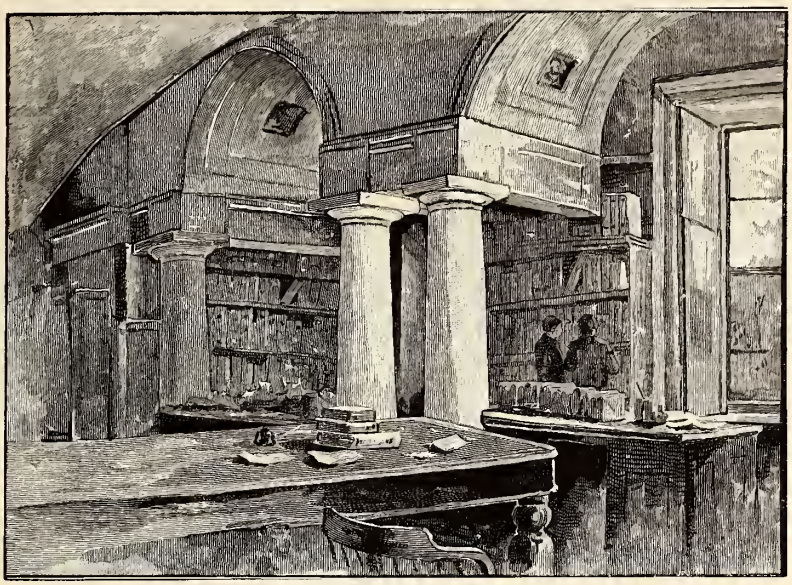
Upon the refusal of the Senate to confirm Rutledge as chief-justice, President Washington sent in the name of William Cushing, of Massachusetts, an associate-justice of the court. Cushing was one of the most eminent jurists in the country, and came of a family of lawyers. He was born in Scituate, Massachusetts, in 1732, and shortly after his admission to the bar was made judge of probate. He may be said to have inherited his next promotion from his father, who was a judge of the Superior Court in the colony, for, upon the father's death, the son was at once appointed to the vacancy. In 1775 he became Chief-Justice of Massachusetts, an office he held for fourteen years, when he was selected by Washington as one of the Associate-Justices of the Federal Supreme Court on its organization. He attended the first meeting in New York, and his name is rarely absent from the records of the subsequent sessions in New York and Philadelphia. The notification of his promotion to the chief-justiceship came to him in a singular way. The day the appointment was signed, Washington gave a dinner-party, and Cushing was one of the invited guests. Arriving rather late, he found the President and the other guests already at table. The place of honor at Washington's right hand was vacant. When Cushing entered, Washington said in a clear, emphatic tone: "The Chief-Justice of the United States will please take a seat at my right hand." Cushing, who had not expected the promotion, was deeply affected by the announcement and the congratulations which followed. The Senate promptly confirmed him by a unanimous vote. He held his commission only a week, and then resigned, in spite of the efforts of Washington to dissuade him. He had presided over the court during Jay's absence in Europe, but, as he never sat as chief-justice, his name is often omitted from the list of those who have held the office. He remained upon the bench as associate-justice until his death in 1810.

Cushing was of good stature, erect, graceful, and dignified. He had a fair complexion, brilliant blue eyes, and an aquiline nose. He adhered to the Revolutionary style of dress after it had generally been abandoned, wearing a cocked hat, knee-breeches, silk stockings, and low shoes with big buckles, to the day of his death. He was a good conversationalist, social, cheerful, kind, very tender of private character, greatly beloved by his family and friends, and had the rare and admirable trait of always looking on the best side of human nature.

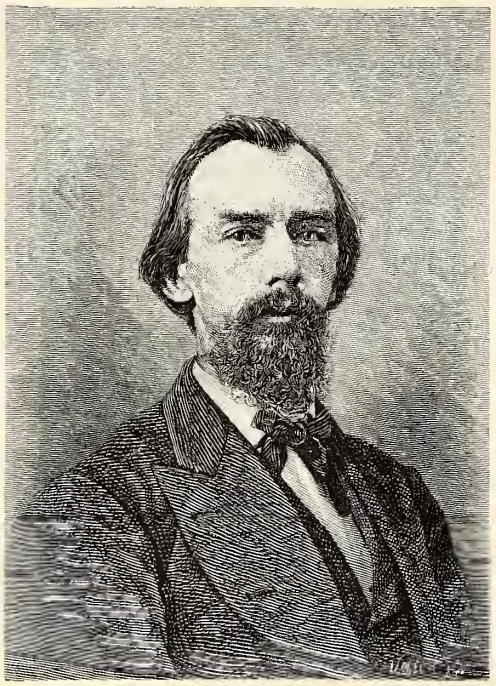
Washington's third choice for Jay's vacant chair fell upon Oliver Ellsworth, then a senator from Connecticut, and one of the foremost statesmen of the time. Born in Windham, Connecticut, in 1745, Ellsworth was educated by his father for the ministry. He studied at Yale, and later at Princeton, and then read theology with Dr. Smalley, a clergyman of considerable reputation in New England. All this study only developed in the young man a distaste for the ministry, and, in spite of the remonstrances of his father, he left the great doctor of divinity and began to fit himself for the bar. As soon as he was admitted to practice, and before he had earned a single fee, he took to himself a wife. Possessed of an indomitable will, and of a gift of vigorous, practical oratory, he had not long to wait for success in either politics or law. We see him soon in the Connecticut Assembly as an ardent patriot, then in the Continental Congress, then back in his own State as a judge of her Supreme Court. He was a member of the convention that framed the Federal Constitution, and on the organization of the new government was chosen one of the Connecticut senators, leaving the Senate for the Chief-Justice's chair in 1796. Very little business came before the court when Ellsworth was upon the bench. The questions which afterward tested the strength and endurance of the federal system had not ripened. It may be said, however, that though an ardent State's rights man while in the Senate, like most of the Connecticut politicians of that day, he took an enlarged view of the powers of the

General Government while he sat upon the supreme bench, and his opinions were in line with the patriotic sentiment of nationality which had begun to combat the narrow and selfish provincialism that characterized the utterances of many of the public men of the time. In 1799, President Adams, on the recommendation of a Senate committee, sent a commission to France to negotiate a treaty. Oliver Ellsworth, Patrick Henry, and William Vans Murray were the commissioners. Upon his return in 1801, the Chief-Justice resigned his seat upon the bench and retired to his farm in Windsor, Connecticut. He consented to serve for a short time as a member of the Governor's Council, but declined the chief-justiceship of the State in 1807. In November of that year he died. Trumbull's portrait of Ellsworth is regarded as an accurate likeness. His features were singularly rugged and strong. So angular do they appear in the marble bust in the Supreme Court room, that one might almost suppose the sculptor had only rough-hewn the face, and had failed to round off the square forehead and the projecting nose and chin. Ellsworth was not accounted a man of genius. It was said of him that he did not descend to his subject from above, but rose to it by regular gradations of logic. His habits of thought were slow and laborious. He read few books, had little sense of the beautiful, and not much creative power. Nature, says his biographer, formed him for the discharge of active duties rather than for contemplative studies.

John Marshall, of Virginia, who succeeded Ellsworth, is rightly called the great Chief-Justice. It was he who established the power of the Supreme Court as we recognize it at the present day. It was he who, more than any other man of his time, carried forward the work of the constitution in welding the loose league of States into a compact, powerful nationality. It was he who smothered, for nearly half a century, the dangerous doctrine of State sovereignty, which, a quarter of a century after his death, convulsed the country with civil war. Marshall was born in Fauquier County, Virginia, in 1755, and grew up on a farm. In his youth he studied Latin with a Scotch clergyman, and read law. When the Revolution broke out he enlisted in a militia company, and soon afterward was commissioned lieutenant in the Eleventh Virginia Infantry. The young soldier fought bravely at the battles of Germantown, Brandywine, and Monmouth, and took part in the storming of Stony Point. When the war ended, he went back to his law-studies, was soon admitted to the bar, and began to practice in the local courts. Tall, gaunt, awkward, and ill-dressed, he made a striking figure among the fine gentlemen of the Virginia towns; but his talents were conspicuous, and he rose rapidly in his profession by his remarkable power of seizing the attention, extracting at once the kernel of a question, and producing conviction in the minds of his hearers. When he first appeared in Richmond to argue a case, he sauntered about the



A CORNER IN THE LAW LIBRARY.



JOHN G. NICOLAY, MARSHAL OF THE SUPREME COURT. (FROM A PHOTOGRAPH BY BRADY.)

streets in a plain linen roundabout, looking like a slouchy country bumpkin; but once in court, he astonished the judge and the bar by his wonderful powers of analysis. William Wirt said he had an almost supernatural faculty of developing a subject by a single glance of his mind, and detecting the very point upon which every controversy depends. He comprehended the whole ground at once, and wasted no time on unessential features. "All his eloquence," said Wirt, "consisted in the earnestness of his manner, the close connection of his thought, and the easy gradations by which he opens his lights upon the attentive minds of his hearers."

Entering public life, Marshall became a member of the Virginia Legislature and of the convention which framed the State Constitution. He was sent to France as a special envoy in 1797, and returned in 1798, and was elected to Congress the next year. He delivered a eulogy on Washington which attracted universal attention. In 1800 he became Secretary of State in the Cabinet of John Adams, and in 1801 was appointed chief-justice. We are indebted to his biographer, Judge Story, who sat upon the Supreme Bench with him for twenty-four years, for more than one striking description of his person and character. "His body," wrote Story, "seemed as ill as his mind was well compacted; he was not only without proportion, but of members singularly knit, that dangled from each other and looked half dislocated. Habitually he dressed very carelessly in the garb, but I would not dare to say in the mode, of the last century. You would have thought he had on the old clothes of a former generation, not made for him by even some superannuated tailor of that period, but gotten from the wardrobe of some antiquated slop-shop of second-hand raiment. Shapeless as he was, he would probably have defied all fitting by whatever skill of the shears; judge, then, how the vestments of an age when apparently coats and breeches were cut for nobody in particular, and waistcoats were almost dressing-gowns, sat upon upon him." In another description Story says Marshall's hair was black, his eyes small and twinkling, his forehead rather low, but his features generally harmonious; and speaks of an occasional embarrassment in his speech, form a hesitancy and drawling; of a laugh "too hearty for an intriguer," and of his good temper and unwearied patience on the bench and in the study. Harriet Martineau made the following effective little pen-sketch of a scene in the Supreme Court room when Marshall was delivering an opinion — the time 1835, when the great Chief-Justice was fourscore years of age, and within a few months of his death:

"At some moments the court presents a singular spectacle. I have watched the assemblage while the Chief-Justice was delivering a judgment, the three justices on either hand gazing at him more like learners than associates; Webster, standing firm as a rock, his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intent stillness which instantly fills the eye of a stranger; Clay leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff-box for the moment unopened in his hand, his small gray eye and placid half-smile conveying an expression of pleasure which redeems his face from its usual unaccountable commonness; the Attorney-General (Benjamin F. Butler, of New York), his fingers playing among his papers, his quick, black eye and tremulous lips fixed, his small face, pale with thought, contrasting remarkably with the other two. These men, absorbed in what they are listening to, thinking neither of themselves nor of each other, while they are watched by the group of idlers and listeners around them,— the newspaper corps, the dark Cherokee chiefs, the stragglers from the West, the gay ladies in their waving plumes, and the members of either house that have stepped in to listen,—all these have I seen at one moment constitute one silent assembly, while the mild voice of the aged Chief-Justice sounded through the court."

If the reader wants to realize this scene, let him go down into the basement of the Capitol, to the low-vaulted room now occupied by the Law Library, imagine the book-cases removed, and the judges sitting just under the curious colored bas-relief on the wall, and fill in the picture by the aid of Miss Marti-

neau's description. There are two portraits of Marshall in the consultation room of the court,—one by Peale, which is charming as a work of art, but has so little vraisemblance that it might pass for almost anybody as well as the great jurist; the other is a rude affair, copied from a picture in the possession of Marshall's descendants, which is said to be a fair likeness, though an undeniable daub.

It is impossible, in the limits of this article, to give even a sketch of Marshall's work upon the bench. For the benefit of readers who are not lawyers, something may be said, however, about a few of his most important constitutional decisions sustaining the powers of the Federal Government and vindicating the authority of the Federal Judiciary over both State tribunals and State legislatures. The best-known of these decisions is probably that given in the Dartmouth College case, which broadly asserted the authority of the Supreme Court to annul State laws repugnant to the Constitution of the United States. The Legislature of New Hampshire had passed an act which invaded and practically annulled the charter of the college. The State courts affirmed the validity of the law, but the Supreme Court set it aside as a violation of the provision in the constitution prohibiting legislation impairing the validity of contracts. In the argument of the case Daniel Webster was one of the counsel for the college, and William Wirt for the State.

Another important case bearing upon the authority of the court was that of Marbury against Madison. Marbury had been appointed by President Adams a justice of the peace for the District of Columbia. The commission had been signed, but not delivered, when Jefferson succeeded Adams, and Madison, the new Secretary of State, refused to hand it over. Marbury sued for a writ to compel Madison to give it to him. The court held that it had no original jurisdiction in the case, and refused the writ; but Marshall gave an opinion that the District Court could issue the writ, and that the case could come up on an appeal. The principle established was that the court had jurisdiction over the executive branch of the Government to compel it to perform ministerial functions in accordance with law. This principle was affirmed later in Jackson's time, when the court issued a writ of mandamus to Amos Kendall, Postmaster-General, to compel him to pay a mail contractor.

Perhaps the most important of Marshall's political decisions was that in the case of McCulloch against Maryland, involving, as it did, a vital question relative to the powers of the State and General governments. In reality, the suit was a dispute between Maryland and the United States. Each denied the constitutionality of a law of the other. A branch of the United States Bank had been established in Baltimore, and the Legislature of Maryland passed a law taxing it. The bank maintained that the law was repugnant to the constitutional powers of the General Government. The State attacked the constitutionality of the Bank Charter Act. Chief-Justice Marshall held that the question was one of absolute supremacy between the powers of Maryland and those of the General Government. If the States, he said, may tax one instrument employed by the Government in execution of its powers, they may tax any and every other instrument,—the mails, the mint, patent rights, and judicial processes,—to an excess which would defeat all the ends of the General Government. The American people, he declared, did not design to make their government dependent upon the States.

In the case of Cohen against the State of Virginia, Marshall decided that a writ of error would lie from the Supreme Court of Virginia to the Supreme Court of the United States, and that it was no valid objection to the jurisdiction of the latter tribunal that one of the parties was a sovereign State and the other a citizen of that State. Jefferson, speaking for the anti-Federalists, denounced this doctrine as extra-judicial, and in defiance of the Eleventh Amendment of the Constitution. The Chief-Justice amplified it in the case of Martin against Hunter's Lessees, deciding that the appellate jurisdiction of the Supreme Court extends to a final judgment of the highest court of a State, where the validity of a State law is drawn in question as being against the Constitution, treaties, or laws of the United States. These decisions have defined the jurisdiction and governed the action of the Supreme Court ever since.

Marshall died at his country-seat, in Fauquier County, Virginia, in 1835, during a recess of the court. Andrew Jackson was then President. He appointed to the vacant chief-justiceship his Attorney-General, Roger B. Taney, an able lawyer and an active Maryland politician of the then newly organized Democratic party. Taney was born in Calvert County, Maryland, in 1777, and after studying in Dickinson College and reading law in Annapolis, came to the bar in 1799. He served in both branches of the Maryland Legislature, was Attorney-General of the State, and in 1831 entered Jackson's Cabinet. Two years later the President, to whom Taney had rendered important political services, wanted to give him the Treasury portfolio,

but the Senate refused to confirm him. In January, 1835, Jackson nominated him as an associate-justice of the Supreme Court, but the Senate, still adverse, indefinitely postponed the nomination. Better fortune attended his appointment to the chief-justiceship, on the death of Marshall, in the same year; though strongly opposed by Clay and Webster, he was confirmed by a majority of fourteen votes. Taney sat for twenty-eight years in the chief-justice's chair. He was a jurist of remarkable ability, and would perhaps rank next to Marshall in the pages of history, as the second among the great intellects that have adorned the Supreme Bench, had he not by a single decision permanently obscured and for a season totally eclipsed the well-won fame of a life-time. Men whose memories of public events do not go back so far as 1857 can scarcely realize the depth of indignant feeling aroused in the Northern States by the Dred Scott decision, with which Taney's name will, unfortunately for his reputation, be chiefly and almost exclusively identified. Dred Scott was a negro belonging to an army officer, who had taken him into a Free State. This act entitled the slave to his liberty, and when he was afterward taken back to Missouri, he sued for his freedom. The case was carried up to the Supreme Court, and Taney, speaking for the majority of its members decided that persons of African blood were never spoken of or thought of except as property when the Constitution was formed, and were not referred to by the Declaration of Independence, which says that all men are created free and equal, and entitled to life, liberty, and the pursuit of happiness. Such persons, Taney declared, had no status as citizens, and could not sue in any court; and he asserted as a historical fact that, at and prior to the Declaration of Independence, negroes were regarded as "so far inferior that they had no rights a white man was bound to respect." This decision shocked the humanity of the civilized world. It marks in history the culmination of the slave power in America. After it was delivered the growth of the Anti-Slavery party, already well advanced, was rapid. Three years later the resistance of the North to the insolent encroachments of the "accursed institution" led the South to seal its doom by open rebellion. Taney was a slaveholder, but was one of the kindest and most generous of masters. His cruel decision proceeded from no hardness of heart, but was purely the result of his political bias and the honest outcome of his logical processes of reasoning. Grant the legal and historical premises upon which he bases it, and the conclusions he draws are inevitable.

There was no sadder figure to be seen in Washington during the years of the war than that of the aged Chief-Justice. His form was bent by the weight of years, and his thin, nervous, and deeply furrowed face, shaded by long, gray locks, and lighted up by large, melancholy eyes that looked wearily out from under shaggy brows, gave him a weird, wizard-like expression. He had outlived his epoch, and was shunned and hated by the men of the new time of storm and struggle for the principles of freedom and nationality. He did his duty faithfully to the last, however, in all the hard routine work of the court. Death came to his relief in 1864. The harsh judgment formed of him has been largely modified by time, and his character as an upright and able judge, a pure-minded man, and a devoted father and friend, begins to be recognized. He died poor, and one of his daughters now supports herself by the work of a Government office in Washington. For several years after his death, Taney's bust was excluded from its place among the chief-justices on the wall of the court-room. It stood in a sort of limbo, in a niche in one of the passages near the Senate chamber, and Charles Sumner watched every appropriation bill to prevent an item being included to authorize its purchase. When Sumner died, there was no further opposition to paying for it and giving it its proper place.

Salmon P. Chase, the recent Chief-Justice, will live in history, not so much as a jurist, but as one of the small band of eminent statesmen and philanthropists who took the agitation against human slavery into the field of practical politics and there guided it forward to its complete triumph in universal liberty and equal suffrage and citizenship. Born in Cornish, New Hampshire, in 1808, he went to Ohio as a boy, gained an education by hard work and self-denial, and rose from a position of poverty and manual labor by the force of intellect and character. He was admitted to the bar of the District of Columbia in 1829, and entered the mingled career of law and politics which most ambitious lawyers followed at that time. The law was soon laid aside for the duties of public life, but not until he had distinguished himself by his arguments in important cases. He served in the United States Senate from 1849 to 1855, and was Governor of Ohio from 1855 to 1857. Belonging first to the Democratic party, he was the leader of its anti-slavery element until the rise of the Republican party, of which he was one of the original organizers and most conspicuous chiefs. A leading candidate for the Presidential nomination in 1860, he was invited by his successful competitor, Mr.

Lincoln, into the first Republican Cabinet in 1861, and left the Senate, to which he had just been chosen for the term of six years. As Secretary of the Treasury he performed the stupendous task of supplying the Government with money to carry on the war. To him were largely due the financial measures which brought the means of support to the armies of the Union, and made the suppression of the rebellion possible. The bond and legal tender acts, and the National Bank system, were in great part his creations. On the death of Taney, President Lincoln appointed Mr. Chase Chief-Justice. Like his two predecessors, he had never sat upon the bench of any court when he put on the black robes of the highest judicial station in the country, and, unlike them, he had acquired no special eminence at the bar. Indeed, he had practiced very little since his younger days. He possessed, however, invaluable qualifications for his new position in his thorough knowledge of our system of government, in its principles and in all its operations; in a strong, well-balanced and philosophic mind, and in a calm, judicial temper. His service upon the Supreme Bench, cut short by his untimely death in 1873, at the age of sixty-five, was a fitting conclusion to a life spent in dealing with the larger affairs of state. His opinions were clear and vigorous, and bore the stamp of a strong, original mind. Such of them as touched political questions were in line with the principles of equal rights and supreme national authority which the war firmly established. The Dred Scott decision was set aside in a way which, though indirect, was effective and peculiarly appropriate. In pursuance of an understanding between the Chief-Justice and Senator Sumner, the latter appeared in court, on February 1, 1865, accompanied by a colored man, and said: "May it please the Court, I present John S. Rock, a member of the bar of the State of Massachusetts, and move that he be admitted as a counsellor of this court." The Chief-Justice bowed, and said: "Let him come forward and take the oath." Mr. Rock was then sworn, in the usual form, at the clerk's desk. Mr. Chase was tall in stature, and of large and muscular form. His eyes were blue, his complexion was fair, his forehead was broad and high, his features were regular, his expression was singularly winning, and his manners were agreeable and graceful. There have been few better types of the highest range of American statesmanship.

Chief-Justice Chase was succeeded by Morrison R. Waite, of Ohio, who was appointed by President Grant in 1874. Mr. Waite was born in Lyme, Connecticut, in 1816, was graduated at Yale College in 1837, and soon after went to Ohio. He gained a prominent position at the bar of that State, was one of the Government counsel at the arbitration of the Alabama claims at Geneva, and was occupying the chair of the Constitutional Convention of Ohio when informed of his appointment as chief-justice. It is not within the scope of this article to speak of his work on the bench, or of that of any of the justices now living. An exception must be made, however, in order to complete the record of the main political decisions of the court. What are known as the Louisiana Slaughter-house cases were decided during the chief-justiceship of Mr. Chase, and against his judgment, the opinion of the majority of the court being delivered by Justice Miller. This decision exercised a powerful political influence in checking the tendency to consolidate power in the Federal Government and to deprive the States of their right to regulate their local affairs. It put a stop to the idea which had inspired much of the recent action of the dominant party, that the amendments to the constitution adopted after the war were intended to be a total reconstruction of the Constitution on the principle that the federal power was omnipotent on every subject it chose to act upon, and restored the just and harmonious equilibrium of the dual system of State and national authority. A great deal of feeling was aroused in Congress by this decision, but it has since been generally acquiesced in; and if the court, which was then nearly equally divided upon the question, were to pass upon it now, it would probably be unanimous. Another important decision of the same period should also be mentioned. The court in 1870 had held the legal tender act to be unconstitutional so far as it applied to contracts made before its passage. Two new justices, Mr. Bradley and Mr. Strong, were appointed in pursuance of an act of Congress, restoring the former numerical strength of the bench. The case was re-argued, and the previous decision reversed by their votes. Lawyers still differ as to the correctness of this last decision.

In 1877 the court was called upon to furnish five of its members to a unique mixed commission created to settle a disputed title to the Presidency. This body, called the Electoral Commission, was composed, besides the five justices, of five senators and five representatives. It sat in the Supreme Court room, heard arguments on the question of accepting or rejecting the electoral votes of States about which the two houses of Congree had disagreed, and reached decisions by a majority vote of its members. The members of the court who belonged to it were

Justices Clifford, Field, Bradley, Miller, and Strong. Justice Clifford presided. In all test-votes the decision was so close that the vote of one justice, Mr. Bradley, was decisive. The practical result of the commission was that the vote of Justice Bradley made Rutherford B. Hayes President of the United States, and rejected the claim of Samuel J. Tilden. One of the members of the commission was the late President Garfield, then a Representative, whose seat was just beyond that now occupied by Justice Blatchford.

The organization of the Supreme Court has more than once been changed. Originally consisting of a chief-justice and five associate-justices, as we have seen, it was enlarged in 1807 by the addition of a sixth associate. The States of Ohio, Kentucky, and Tennessee had come into the Union, and were made into a new circuit, represented on the bench by Thomas Todd, of Tennessee. In 1837 two more justices were added by law, the new appointees being John Catron, of Tennessee, and John McKinley, of Alabama. In 1863 a ninth associate justice was added, to give the Pacific coast a representative. This was thought to be good political policy at a time when the Union was in the throes of rebellion; and besides, the court needed the assistance of a judge who was familiar with the peculiar land system of California, inherited from the Mexican and Spanish *régimes*. Stephen J. Field, of California, was the appointee. When Justice Catron died, in 1865, Congress was in the midst of its long, serious struggle with President Johnson, a struggle which ended in the practical subversion of the Constitution by depriving the President of important functions of executive power, and reducing him in real authority below the level of his cabinet ministers. To prevent the appointment to the Supreme Bench of Democrats in sympathy with Johnson's Southern policy, a law was passed over the President's veto, forbidding the filling of the existing vacancy, or of any future vacancy, until the number of associate-justices should be reduced to six. The death of Justice Wayne in 1867 reduced the number to seven. In 1869 a new law increased the number to eight, and President Grant appointed Justices Strong and Bradley.

In all there have been seven chief-justices and forty-three associate justices—a small number for a period now almost spanning a century. John Marshall and Joseph Story each served thirty-four years. James M. Wayne and John McLean each served thirty-two. The next longest term was that of Bushrod Washington, a nephew of George Washington and the heir of Mount Vernon, who sat for thirty-one years. William Johnson was thirty years on the bench. Roger B. Taney twenty-eight, John Catron twenty-eight, and Samuel Nelson twenty-seven. There have been but seven clerks of the court, and the first two resigned after brief service. Practically the court has had but three clerks before the present incumbent. Of these three, lawyers will kindly remember the amiable character and never-failing courtesy of Mr. D. W. Middleton, who died in 1880, after having been connected with the office fifty-five years, and at its head for seventeen. In announcing his death, the Chief-Justice said:

> "His handwriting first appears on the records of the court under date of the 7th of February, A. D. 1825. From that date until his death he was, without interruption, actively engaged in the business of the office to which his successor has just been appointed, and even a whisper of complaint against him in any particular has never reached our ears. Three chief-justices of the court and eighteen associate-justices have died since his service began. He was a most accomplished officer, courteous in manner, dignified in deportment, faithful in every duty, and never unmindful of the confidential relations he had with the court."

The present clerk is James H. McKenney. Formerly, the Marshal of the District of Columbia acted as executive officer of the court, but in Chief-Justice Chase's time the marshalship was made a distinct office. It has had but two occupants: Richard C. Parsons, of Ohio, and John G. Nicolay, of Illinois. An excellent civil service system prevails among the minor employees, some of whom are the sons and grandsons of former clerks and messengers. The strife for office, which is one of the great evils of public life in this country, has never invaded the precincts of the Supreme Court.

Formerly the service of an occupant of the Supreme Bench was terminated only by death or resignation; but in 1869 a law was passed permitting any justice to retire, with full pay, when seventy years of age, provided he has served ten years. Three retired justices, Swayne, Strong, and Hunt, are now living.

The federal judiciary system divides the country into sixty districts. There are fifty-three district judges, a few having more than one district to look after. The districts are consolidated into nine circuits, for each of which there is a circuit judge. In each circuit a Supreme Court justice is also assigned, whose duty it is to attend the sittings of the Circuit court as often as once in two years. Before 1869 there were no circuit judges, and the circuit duty of the members of the Supreme Court was much more onerous. Probably they will be relieved of it altogether before long, for their duties upon the Supreme Bench have become so onerous that numerous measures have been recently urged in Congress for their re-

lief, and for the advantage of litigants, whose cases are usually delayed two or three years by reason of the great length of the docket.

One of the plans recently presented in Congress for the relief of the court, provides for an increase in its membership, and the division of the tribunal into branches, each branch to be charged with the hearing of a certain class of cases, as, for instance, patent cases, admiralty cases, and so forth, and the full bench to consider only a limited range of cases of great importance. Some doubt has been expressed as to the constitutionality of this plan, on the ground that a part of the court could not be held to be the Supreme Court within the meaning of the Constitution.

Another plan is to interpose between the Circuit courts and the Supreme courts a new tribunal, to serve as a sort of dam to stay the flood of business pressing forward to the Supreme Bench. This new tribunal, it is proposed, shall have power of final decision to such an extent as to relieve the Supreme Court of a large share of the business now coming before it.

Still a third plan is to establish a high limit of the amount involved in cases that can be brought to the Supreme Court on appeal. This latter plan appears to be the one most favored by the members of the court. They do not, as far as can be learned, approve of the division of the court into a number of subordinate tribunals, nor do they appear to think it wise to limit the class of controversies in which litigants have the right to demand a decision from the tribunal of last resort.

E. V. Smalley.

INVITA MINERVA.

THE muses ring my bell and run away.
I spy you, rogues, behind the evergreen.
You, wanton Thalia, romper in the hay;
And you, Terpsichore, long-leggéd quean.
When I was young you used to come and stay,
But, now that I grow older, 'tis well seen
What tricks ye put upon me. Well-a-day!
How many a summer evening have ye been
Sitting about my door-step, fain to sing
And tell old tales, while through the fragrant dark
Burned the large planets, throbbed the brooding sound
Of crickets and the tree-toads' ceaseless ring;
And in the meads the fire-fly lit his spark
Where from my threshold sank the vale profound.

Henry A. Beers.

THE CHRISTIAN LEAGUE OF CONNECTICUT.

BY WASHINGTON GLADDEN.

V.

BEFORE the end of the summer vacation, the brass-works at New Albion were in operation, and a large colony of mechanics had occupied the tenement-houses of the "Patch" above the mill. For the use of this new community the town had provided a schoolhouse; a neat hall above the company's store gave room for religious services. The mill was a mile and a half from the nearest church, and something must be done to supply the religious wants of the new community. The question arose at the September meeting of the Christian League Club.

"What is to be done for the brass-workers?" asked Mr. Strong.

"I believe," answered Mr. Thorpe, blushing a little, "that our people have already taken steps toward organizing a church in that neighborhood."

"Indeed!" exclaimed Dr. Sampson. "The Baptists have also consulted me about services there, but I declined to express any

opinion until some conference had been held upon the matter by this club."

"I want it understood," answered Mr. Thorpe, "that I have done nothing about it. One of the overseers at the mill is a zealous Methodist, and he has found out that quite a number of the hands belong to our connection. The presiding elder was down there the other day, and conferred with him about it. But I felt as the Doctor did, that it would hardly be right for me to help in the enterprise until we had talked it over here."

"Would it not be well," asked Mr. Strong, "to call a public meeting in the hall at the brass-works, of all persons who desire the organization of a religious society, and let them determine for themselves what kind of an organization they will have."

"That is fair," was the verdict of several voices.

"Let us have a committee of seven,—one from each of the denominations represented in this club,—who shall call this preliminary meeting, and be present to take charge of its deliberations."

This was the suggestion of Mr. Peters.

"Good!" was the general response.

"And now," said Mr. Franklin, "I hope nobody will object to my proposition, which is that this committee consist of the pastors of these churches, omitting the pastor of the Second Church. The Congregationalists should not outnumber the others on the committee; and I am sure that the presence of these seven pastors at a meeting of this character will be to the brass-workers an impressive object-lesson in Christian unity."

"Mr. Franklin is exactly right," said Mr. Strong. "My absence will not be misinterpreted, and Dr. Phelps is competent to represent the Congregationalists."

The proposition was, therefore, unanimously agreed to, and a handbill, signed with the names of the seven pastors, called the people of the brass-works together on the next Sunday afternoon. The hall was filled with an interested company. Dr. Phelps, as the senior pastor, took the chair.

"We have called you together," he said in his brief opening speech, "because we assumed that there must be, among the six or seven hundred people of this new settlement, a large number who would desire some sort of religious organization, and because we, the pastors of the Protestant churches in New Albion, desired to assist you, if we could, in forming one. I know that I speak for all of my brethren when I say that none of us cares so much to have a church of his own particular sort formed here, as to have the people here happy in their church relations. We have learned, in New Albion, to dwell together in unity, and we want you to live in the same way. Whatever kind of church is formed here, if it be only a church that owns and follows Jesus Christ, it will receive the right hand of fellowship from every one of our churches. It is evident that there ought not to be more than one church in this small community; we have come to assist you in deciding what form that organization shall take. I understand that some steps have been taken toward forming a Methodist church here. We shall have no objection whatever if the society takes that form, if that is the wish of the community; we only care that you should be heartily agreed among yourselves, and work together harmoniously."

Three or four of the other pastors followed with short speeches, each of whom testified, with equal clearness, to the desire of all for unity and coöperation among the Christians at the brass-works.

"And now," said Dr. Phelps, "we propose to submit this matter to the decision of those interested. Those who wish to have a religious society organized in this place, and who will pledge themselves to assist in supporting it, either by contributions, by Christian work, or by attendance upon its services, will please rise."

About fifty men and women stood up.

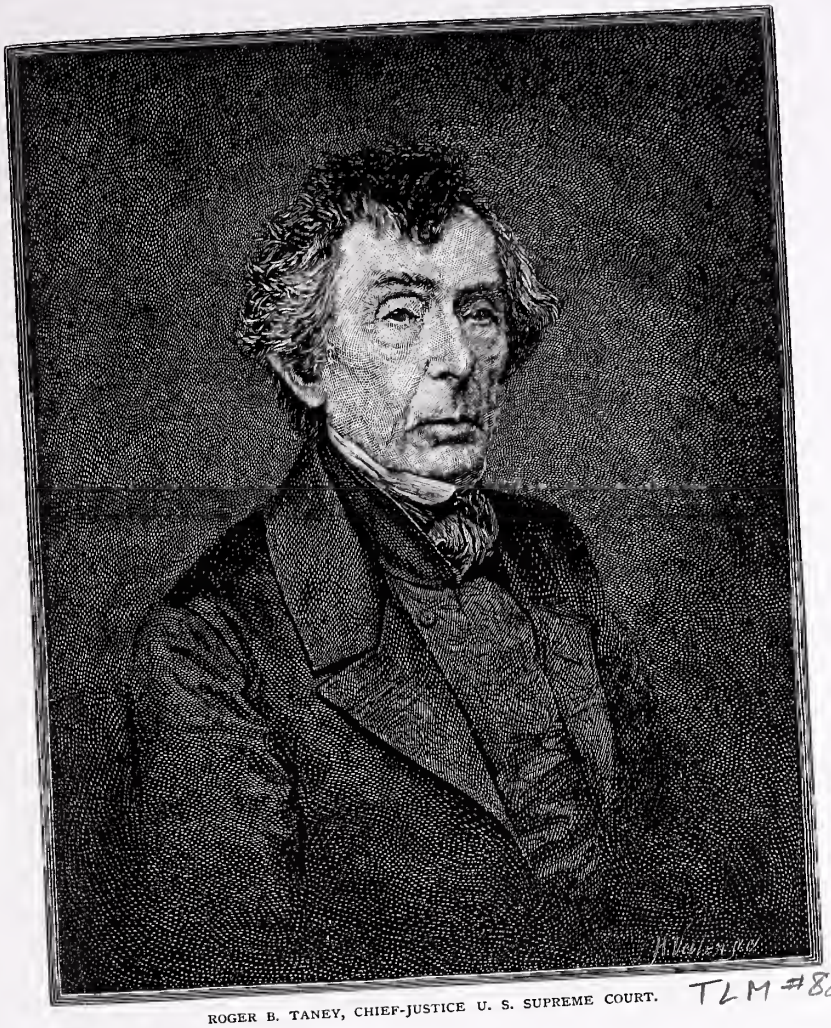
"Very good! Now, for convenience, will those who have thus pledged themselves occupy the seats in the right-hand corner of the hall."

The audience, like most audiences, was a little reluctant to make this change of seats, but it was at length accomplished, and the corner was occupied by a respectable-looking company, of which one-third were men.

"We shall now," said Dr. Phelps, "distribute among you slips of paper on which you are requested to write the name of the denomination in accordance with whose rules you wish this society to be organized; if you want a Methodist church, write 'Methodist:' express your preference on your ballots."

"If you please, sir," said a stout, ruddy-faced young Englishman, standing up in the right-hand corner, "I have just come over from the old country, and I know but little about your churches here; in England I went to chapel; but I like what I have heard this afternoon, and I wish that the new church might be the same kind that these gentlemen belongs to that has come down here to help us organize, if you will tell me the name of it."

There was a little laugh; but the Englishman was unaware of his blunder, and he kept the floor, waiting to be answered.



ROGER B. TANEY, CHIEF-JUSTICE U. S. SUPREME COURT. TLM #82

dence not necessarily abrogated by the change of government, and among others this doctrine of Lord Mansfield. Unlike England, however, where there was no slavery and no law for or against it, some of the American States had positive laws establishing slavery, others positive laws prohibiting it. Lord Mansfield's doctrine, therefore, enlarged and strengthened by American statutes and decisions, had come to be substantially this: Slavery, being contrary to natural right, exists only by virtue of local law; if the master takes his slave for permanent residence into a jurisdiction where slavery is prohibited, the slave thereby acquires a right to his freedom everywhere. On the other hand, Lord Stowell's doctrine was similarly enlarged and strengthened so as to allow the master right of transit and temporary sojourn in free States and territories without suspension or forfeiture of his authority over his slave. Under the somewhat complex American system of government, in which the Federal Union and the several States each claim sovereignty and independent action within certain limitations, it became the theory and practice that toward each other the several States occupied the attitude of foreign nations, which relation was governed by international law, and that the principle of comity alone controlled the recognition and enforcement by any State of the law of any other State. Under this theory, the courts of slave States had generally accorded freedom to slaves, even when acquired by the laws of a free State, and reciprocally the courts of free States had enforced the master's right to his slave where that right depended on the laws of a slave State. In this spirit, and conforming to this established usage, the local court of Missouri declared Dred Scott and his family free.

The claimant, loath to lose these four human "chattels," carried the case to the Supreme Court of the State of Missouri, where at its

MARYLAND

HISTORICAL MAGAZINE

VOL. VIII. DECEMBER, 1913. No. 4.

TANEY'S CORRESPONDENCE WITH VAN BUREN.

COMMUNICATED BY

BERNARD C. STEINER.

Among the Van Buren Papers in the Library of Congress are found a number of rather important letters from Chief Justice Taney. The first of these, written from Baltimore, on September 16, 1834, begins with an apology for not having written before and a request for an opinion as to Taney's recently delivered speech. Anxious for Van Buren's opinion as to his "having taken the grounds without any opportunity of conferring with friends and not being in the habit of making political speeches, I was of course desirous of knowing what judicious friends thought of it. I should have sent you a copy, but I did not print any extra ones and took it for granted that you would see it in the Globe. Do not think that I am spoiled by the kind manner in which that speech has been received when I tell you that next week you will see another from me. I should have been very willing to end my political speech-making with the one already published. But our friends at Elkton in Cecil County on the Eastern Shore of this State wished me to meet them at a political dinner and my friends thought that I ought to use the occasion to retaliate upon Mr. Webster for his ungentlemanly attack on me in his speech at Salem. I

ought not however thrown the blame (if there be any blame about it) on the advice of friends, for it is quite possible that they merely intended to sanction what they say I was bent on doing, no matter how I was advised. I have not forgotten the counsel you gave me as to the conduct which it became me to pursue and you know I agreed with you, and determined to conform to it. The attack of Mr. Webster however made a new case and I thought it due to myself and to the public to place him in his true position. When you see the speech, tell me frankly what you think of it. Rely upon it I shall not inflict another speech on my friends and it is a part of the provocation with Mr. Webster that he placed me under the necessity of coming again so soon in the newspapers with another speech which it is most probable will not be received with equal favor with the first one.

I rejoice to hear such good accounts of New York. The march of public opinion is now, however, so decisive that it cannot be mistaken and if I mistake not the signs of the times, the men who have been conspicuous panic makers and who brought so much distress and alarm in the country have sealed their fates. The chief factors of last winter will soon find that their condition is like that of the members of the Harford [sic] convention. They will find that they have committed an outrage, too great ever to be forgiven by an injured people. The election in Maine seems to wound our adversaries deeply. They obviously expected a different result and regard it as the evidence of what awaits them in other places. I regret to say to you (in confidence however) that I do not anticipate very favorable results in Maryland. You know our rotten borough system and the power of money in such a case in a small state and the Bank will spend freely to carry Maryland for no other reason than for the pleasure of beating me in my own State. Besides we have in Frederick vexatious local questions about the division of the county about which some of the parties have become so much heated they are ready to lose sight of everything else. But after all the people are thoroughly

roused and animated and whatever is done will be a spontaneous effort on their part without organization or party discipline. Our friends, however, assure me that we shall carry Baltimore by more than our usual majority.

I have read the address of the Herkimer convention (I mean the convention of our friends). It is an able and powerful paper in which the topics appear to be well chosen and exceedingly well handled. What you say of the communication from Columbia county embarrasses me a little. I have received several communications of that kind from committees appointed for that purpose and which from the form in which they came to me seemed to anticipate an answer. Yet I have not answered any of them. For being intended generally for publication, you will readily perceive the sameness of the topics and opinions would uniformly produce a sameness in the answer and I should appear to be saying over the same things too often. But if I answer one I must answer all. Can I under such circumstances answer the one from Columbia? If I can find a point of distinction I will certainly answer it, as it is your native county. If I cannot, I must rely on you to explain to my friends the reason of the omission.

In the closing paragraph, Taney wrote that Van Buren's letter had been opened by his family and forwarded as Taney was absent from home and "My folks have at home a license to open my letters when I am away." He regretted that he could not meet Van Buren at Saratoga and stated that his family would remain in Washington for the present, as he could not get possession of his Baltimore house until the middle of October. The last sentence is "This is an unconscionable long letter to one who has so many to read and to write as you have."

Taney wrote again from Baltimore on March 25, 1835, marking the letter "private," as he generally did. He returned a vindication which Van Buren had prepared of his instructions to McLane [1] and remarked: "The defence is conclusive, but did

[1] Louis McLane (1786-1857), Secretary of the Treasury, 1831-1833.

any one ever seriously doubt it? The charge was got up not to maintain the honor of the nation but to crush, if possible, a rival." The proposed change in the Post Office Department, by the appointment of Amos Kendall as Postmaster General, was attracting public attention. Taney feared "that it will be badly received by many of our friends and will create some excitement among them. But there have been so many occasions in which measures which appeared to be full of danger, were successfully and triumphantly carried through by the President, that I will not suffer myself to anticipate evil from this. I am satisfied that the department will be ably and faithfully and honestly administered. And those who are really the friends of the President can hardly refuse to give this appointment fair trial before they condemn it.

"Yet I could have wished the change had not been made at the moment when we are approaching elections, which cannot fail to exercise a powerful influence on future events. If the elections of this spring go well, they will give a favorable impulse to public opinion and go far to put down at once the efforts which are making to divide the party. If on the contrary, they should terminate disastrously, it will give confidence to the malcontents and make the struggle for the next President a severe one. Our adversaries, you know, have a particular talent for getting up an excitement to operate on a particular election and will no doubt try their best with this appointment. And our friends are too apt to be startled at first by the noise and clamour of the adversary and to require a little time to recover from the shock. Yet after passing through the panic war, we have a right I think, to count with confidence on the steadiness of the great body of the people and to feel assured that every thing in their hands will go well." In the end of the letter, Taney advised Van Buren to take up his old quarters at Barnum's "when you visit us."

Taney's fears were not realized and on May 12, 1835, he wrote, on the same subject, that he was now convinced of his mistake as to the way that Kendall's appointment as Postmaster

General would be received. "The appointment is popular, decidedly popular, with the great body of the people and even the quiet business men of the opposition are well satisfied with it. I rejoice that the President determined on his appointment and has placed him in a situation to show his real value. He will gain every day upon public confidence and esteem. I congratulate you on the result of the Virginia elections. Yet if I mistake not the signs of the times, there will be deep intrigues and desperate efforts to send the election to Congress. But they will assuredly fail, for the Jackson party are becoming every day more and more united and more and more sensible of the necessity of Union. Will Leigh[1] resign? I think he must, yet do not feel very sure about it. The result in Rhode Island will give them hopes (together with the new combinations they have formed) that they may retain, a majority in the Senate. And I doubt whether Leigh will resign, if his holding on will give them the majority.

"You read of course Colonel Benton's Louisville letter published a short time ago. How remarkably happy he has been in every speech and every published letter, since the commencement of the panic war. I am glad he has determined to bring back the word *expunge* to his resolution. Nothing short of that word ought to be thought of or listened to for a moment. He is right too in urging a more full and continued investigation into the causes of the distress which then prevailed. Our friends ought not to suffer that subject to drop, for the men who took part in making that war upon the country ought to be remembered. I sometimes think of writing the history of the period with names and things at full length and in plain words. I think I could make an interesting book of it and render the public some service by presenting a connected history of that extraordinary contest. Besides I should like to put into a shape that may be read in after times the characters and conduct of the men who figured in that struggle and not

[1] Benjamin Watkins Leigh (1781-1849), Senator from Virginia.

leave the Bank agents and their hired writers to send their own account of it to future generations. What think you of my scheme?

"Our friends here are preparing with becoming spirit for the Convention and from all we hear it will be numerous and imposing. You will remain, I presume, at Washington until it is over. There is a good deal of talk about the Vice-President and I am not sure whether the choice will fall on Johnson [1] or Rives.[2] Everything howevr indicates that there will be much harmony of feeling upon the occasion with the exception of that unfortunate Pennsylvania affair which I fear is growing worse and worse every day. There seems now to be no hope of peace among themselves, but I hope the convention will not suffer their quarrels to find their way into the proceedings of the convention."

The thought of writing an account of the struggle between Jackson and the Bank continued for some time in Taney's mind. After the National Convention had nominated Van Buren for the Presidency, on June 2, 1835, Taney wrote from Baltimore: "Although I have not been among the first to congratulate you on your recent nomination to the first office in the world, yet there is no one who more cordially rejoices in the confident anticipation of your success. And being quite sure that you have no doubt about my feelings on this matter, I should not have troubled you with my written congratulations if I had not desired to write to you on another subject.

"Since I received your letter with the notes inclosed in it, I have thought more seriously of writing the history of the Bank war and have been reflecting on the form it should assume. My object, as I before mentioned, is to send down to posterity a true history of that conflict and of the motives and actions of men who figured in it. It must, I think, always be regarded as one of the most memorable periods of our history and the position it was my fortune to occupy might perhaps make a

[1] Richard Mentor Johnson (1781-1850), Vice-President, 1837-1841.
[2] William Cabell Rives, of Virginia (1793-1868).

book from me an object of some curiosity. I could, moreover, intersperse it with anecdotes, conversations and incidents of private intercourse which would in after times give interest to the work and which would not only foster public attention upon it, but would enable me to do more effectual justice to the parties engaged in the contest. You know when men in bygone days have been engaged in great and hazardous conflicts, we are anxious to follow them in their moments of retirement and read what they said in their private conversations and wish to know how they felt and spoke, when the world was not looking upon them. I think in such a book, I should leave a picture of the President which, in future ages, his countrymen would delight to look upon and which would give a warmer glow to the heart of the patriot. Justice never can be done to him, unless it is known what untiring efforts were made to turn him from his purpose by men in high station and in free and constant and confidential intercourse with him. For example, there are very few beside you and myself who know what unsparing efforts were made to induce him to send in a milk and water and half way veto in 1832, instead of the manly and noble message with which he met the crisis and, according to my present notions, I should begin my history about that time or with that session of Congress.

"You will readily perceive that if such a book were published while the public mind is yet heated with the contest, it would involve me unavoidably in angry controversy and my book would perhaps, in after times, be regarded as one of the partizan publications of the time and of not higher authority.

"My wish is to make a book of a higher character and I am not sure that it would not have more weight, if it were not published until after my death. It certainly could, in that case, be written with more freedom and I should like to write without reserve, because I could by that means be more just to all of whom I spoke and I should moreover have an opportunity of having my statements examined by friends before they were published and I might enrich the work also by anecdotes,

which you and a very few others might give me and be willing to have published in after times but not now.

"Such is the outline of what I propose to do, unless friends should think it objectionable. I do not mean to tax you with a written opinion about it, but I have stated it, to ask you to think about it and, when we meet again, which I hope will be before long, I shall ask leave to tax you with an hour's conversation about the whole matter."

Before the next letter was written from Annapolis on March 7, 1836, Jackson's nomination of Taney for the Supreme Bench had changed the whole aspect of affairs. Taney now wrote to forestall false reports which might reach Van Buren in Washington: "I am to be heard as counsel at the bar of the House of Delegates in support of the claim of Reverdy Johnson to compensation on account of the damages he sustained from the mob in Baltimore, ever since these outrages were committed, Harker, the editor of the Baltimore Republican has been endeavoring to influence the public mind against the sufferers and to apologize for and excuse the mob. And his obvious design has been and still is to make the dispute between the individuals concerned a party question and to induce the Jackson party in this State to enlist themselves as the partizans of Ellicott and Poultney, in what is a mere private controversy, and at the same time to give their sanction to the proceedings of the mob. I cannot comprehend what has led him to take such a course. I have not seen him, since I met him in your room in Baltimore. The trials in the suits between the parties pending in court are to take place in a few weeks. The Trustees claim against Ellicott and Poultney about three or four hundred thousand dollars, which they say has, in some way or other been improperly taken from the Bank. And if the public mind can be inflamed against Johnson and his associates and still more if it can be made a party one, the verdict will be induced for Ellicott and Poultney and the other side will have no chance for a fair hearing. These considerations have excited just dissatisfaction with the course of the paper and have with many

brought upon Mr. John Nelson unpleasant suspicions, as he is much at Harker's [1] office and is the leading counsel for Ellicott and Poultney. But whatever may be the influence that guides the paper, the effect is most mischievous and a mob spirit has been generated and fostered by it which daily threatens the peace of our city and which openly attempts to exercise a sort of Terrorism over everything connected with the Bank of Maryland and the conduct of the mob. The conduct of this paper is more incomprehensible, because John Dyer, who was the Captain of the Mob, and directed all of its operations and who has fled from the State on that account, was the first Vice-President of the Young Men's Whig Committee in the fall of 1834, which put forth a furious address against General Jackson and myself, while not a Jackson man of the least note was in any way concerned in it and one of its intended victims was McElderry,[2] who was rejected by the Senate for his report of the proceedings of the Bank of the United States. He happened to live in a rented house and removed his furniture in time to save it.

"You know how much I owe Mr. Johnson for the promptness with which he, at my request, investigated the affairs of the Union Bank and saved me from the treachery of Ellicott. I did not therefore hesitate to give him my professional aid, as soon as he asked for it, and indeed I was not sorry to have an opportunity of showing to our friends in Baltimore and elsewhere that I did not sanction the disreputable design of influencing by such means a trial in court nor countenance the still more reprehensible scheme of associating the name of the party with any mob for the destruction of property.

"But as soon as it was known that I was engaged as counsel, attempts were made to intimidate me from coming here to perform that duty and, since I have been here, anonymous letters have been written to me threatening to pull down my house, if I dare to argue the case. Do not be surprised, therefore, if

[1] Samuel Harker, editor of the *Baltimore Republican.*

[2] Hugh McElderry.

you hear that my house is assaulted. But it will be repelled in brief space. I write you this long letter, however, to say that the argument is to take place on the 20th inst. and to show you why it would be very agreeable to me, if my friends would postpone acting on (I suppose I may say confirming) my nomination, until this argument is over. The confirmation at this moment by the Senate would look as if my friends had interposed to prevent the argument and might subject me to the unworthy suspicion of having procured the action of the Senate to avoid meeting the responsibility which has been menaced. You will I am sure, see at once that I owe it now to my own character to make the argument."

The fact that the mail was closing caused Taney to close the letter and on the next day he wrote again stating that, if any efforts in Baltimore have been made "to hasten the action of my friends in the Senate," such efforts are "very mistaken ones, if by *real* friends. I shall make my speech on Thursday and may I say to you that as soon after that day as my friends think right, I should be glad to have the matter disposed of finally. For this thing of being half a lawyer and half a Judge is both unpleasant and unprofitable and the delays and doubts which my enemies have kept up so long has been the only serious annoyance they have ever been able to give me. Enough, however, of my own concerns.

"I have seen many of our leading friends, since I have been here. They are very confident of carrying this State for you and Johnson, and my own opinion decidedly concurs with this. Our friends doubt whether the Whigs, all powerful as they are in the legislature, can bring up their party to make the nomination of Harrison by the legislature. Great efforts will, however be made and reluctant as many of them are I yet think they will feel compelled to make the nomination, although I am satisfied they can not hope to carry him in this State. Nobody here seems to know him or disposed to talk about him and many of their party are sorely mortified at his nomination."

Taney sent his congratulations on the termination of the French Controversy. "How splendidly and gloriously General Jackson will terminate his eventful and splendid public life. I trust he will be long spared to enjoy the warm affection of his friends and the gratitude of his countrymen.

I am glad to see that Blair [1] takes ground boldly against the new United States Bank. If I am not much mistaken, our adversaries will find that this charter procured under such circumstances is another false movement on their part and will strengthen and unite more firmly our friends in Pennsylvania and elsewhere. However, I need not trouble you with these matters, of which you have better means of judging than I have,—When I can come to Washington without incurring the suspicion of coming to electioneer with the Senate, I shall take an early day to pay my respects to my friends there and rejoice with you at the many proofs already given of public opinion and the favorable auguries that shew the people everywhere to be sound to the core and rapidly recovering from the delusions under which in some places they have labored. Present my affectionate remembrance to the President."

A letter was sent from Annapolis to Van Buren on the 10th, which is not found and in which Taney stated that for some reason he had changed his mind as to postponement of the action on the nomination. On the 15th Taney wrote Van Buren from Baltimore. He has heard that Judge Glenn [2] of the District Court in Baltimore intends to resign and recommends Upton S. Heath as his successor. Francis Scott Key had written at the suggestion of Mr. Clayton [3] to Messrs. Cuthbert [4] and King,[5] stating that he believed it would be agreeable to Taney to have his confirmation postponed till Thursday, that

[1] Francis P. Blair (1791-1876).
[2] Elias Glenn. Heath was appointed by Van Buren.
[3] John M. Clayton of Delaware.
[4] Alfred Cuthbert, Senator from Georgia.
[5] Probably John P. King, Senator from Georgia.

he might argue the case for Johnson and Glenn before the legislature. This letter disturbed Taney, who now wished the Senate neither to retard nor hasten its action on account of Taney's engagement at Annapolis. "I have already done everything which duty to myself and others required in the case of Mr. Johnson and Mr. Glenn [1] and I had hoped that my friends, as soon as they had the power, would relieve me from the painful and embarrassing position in which I have been so long placed and that, while there was an active and vindictive opposition to me, in the Senate and out of it, also ready to take advantage of any unforseen event to defeat me, my friends would not leave me for a moment in their power, when it was at their option to put me at once out of their reach." He was surprised and mortified that "my sincere and excellent, but most injudicious friend, Mr. Key has put to hazard by his conduct all the prospects of my future life and that too for a matter in which I have no interest and in which I have already made greater sacrifices of feeling and interest than the parties had any right to ask for. I have no desire that my nomination should be postponed an hour on account of my engagements at Annapolis and I do most anxiously desire not to be surrendered by my friends to the mercies of my adversaries. I have every confidence in Mr. Clayton, but I cannot forget in what manner, pledges made to him by opposition senators on a former occasion were openly broken or openly evaded. Excuse me for the trouble I give you in my affairs, but I wish to place them in hands that are not only friendly but judicious."

Taney thought there was but little danger of trouble in Baltimore. "At all events we are ready to repel it and must repel it or this city will be a mere congregation of mobs and mobmen. But I do not fear them and there has been more smoke than fire."

Three days later, Taney wrote from Annapolis that he made

[1] Mr. Reverdy Johnson and Mr. John Glenn.

no argument for Johnson that day though he appeared and offered to proceed, if the other side were ready. The matter was postponed to Thursday on the application of the corporation of Baltimore. Taney considered that he had done enough to show those who attempted to "intimidate me from the discharge of a clear duty, that they have failed in their object. It is, therefore proper, after what I have before written to you, to apprise you now that I do not wish the action of the Senate on my nomination to be retarded or hastened on account of my engagements here." He wished no haste, as it would be "painful to close my professional life and go on the Bench with such an imputation upon me." He congratulated Van Buren on having Rives again in the Senate and repeated an expression of his hope to come to Washington soon. "But the effect I most feared from any modification whatever was its effect upon the public mind, now highly excited on the subject of the currency and any measure which could be construed into a departure from the policy of the last administration on that subject would have ben full of evil and of lasting evil."

No more letters are found until April 1, 1837, when Taney wrote from Baltimore that he had received Van Buren's letter and had consequently written to ask Murray,[1] as if from Taney's own thought, if he would accept an appointment. He is a "lawyer—a man of strong mind, although not very deeply read in the technicalities of the profession. He has great firmness and decison of character, undoubted integrity and honor and will, if he accepts, be, I am sure, an unexceptionable appointment. He is a firm friend of the present administration and has been steadily such to that of General Jackson in all its trials."

Taney rejoiced at Van Buren's leaving "the special treasury order untouched," and was persuaded that its "modification at this time would produce very little effect in changing the condition of money market, yet whatever effect it would have

[1] I have not identified him.

produced must have been ultimately injurious, for if a modification exercised any influence on the circulating medium it would have been an expansion of the paper and further expansion now that specie is leaving the country would probably end in explosion.

On April 30, 1837, Taney wrote from Baltimore, suggesting that Van Buren write to Howard,[1] or McKim,[2] or both, to prevent honest and real friends from becoming discontented and to defeat the plans of those who mean mischief.

Taney's next letter was dated at Baltimore on July 20, 1837, when he wrote Van Buren, marking his letter as private and answering, after reflection, the questions Van Buren had referred to him. He had difficulty in coming to a conclusion as he had heard no argument and had no opportunity of knowing the state of the "Deposite Banks," nor the effect on them of the suspension of specie payments, nor what are the prospects of resumption. Some banks doubtless are insolvent and many will not be able at once to pay the balances due. Measures for the next session of Congress will be greatly influenced by the amount of money, which the government will be able to obtain from these banks and the time when it may be expected.

"I take it for granted, however, that the banks will not resume specie payments unless coerced by the General Government." Many banks are well disposed but are not strong enough to withstand influence opposing the government. Conditions will grow worse till the government is sufficiently energetic to overcome resistance. Taney believed this condition will continue and "the enemy grow worse, and worse unless measures are adopted by the government sufficiently energetic to overcome the resistance which opposes the return to specie payments. In such measures, the people will be found ready to support the government, as soon as they see that they are

[1] Probably Col. Benjamin C. Howard.
[2] Probably Isaac McKim.

decided on and firmly pursued. Taking this to be the state of things, I proceed to the points you have suggested.

"I would not by any means recommend a further extension of credit on the duty bonds and would adhere to the cash duties. This is the most important of the points you have stated. It is the one upon which it will be found that the resumption of specie payments, or the continuance of the rag currency must depend. It was certainly right in the first moments of the panic and alarm to give the time in order that the government might be able to learn the true state of things and to give well disposed men time enough to recover their composure. And as the session of Congress is now at hand it is certainly right to submit the question to their decision. But rest assured that the Banks never will resume specie payments, until you compel the merchants to pay their bonds, and so long as the suspension of specie payments is accepted by the government as an excuse for the nonpayment of the merchants' bonds, so long will the suspension continue. The Bank of the United States is not only a Bank, but it is a trader, a speculator, and a politician and, in each of its four characters, it is deeply interested in preventing a return to specie payments. It not only exercises absolute dominion over the mercantile community by reason of its immense capital and its powerful English connection, but the interest of the merchants who have overtraded and speculated (they are the mass of the leading merchants) are now identical with the Bank as respects the return to specie payments. They get credit on their bonds and thus make money by the suspension and the ordinary State Banks in the commercial cities, with moderate capital and without powerful foreign support, are incapable of withstanding the mercantile influence, when acting in a mass upon any one of them alone or upon all of them together. For the most part they are under the immediate direction of Traders and speculators, for such persons take most pains to be elected Directors and it is notorious that the merchants compelled the Banks of New York to stop and New York, being the mart

of commerce, the Banks everywhere else necessarily followed their example and this widespread injury to the community was deliberately perpetrated by the merchants, because they expected to gain by it; and to repair in some measure their losses in trade. Some of them expected by this means to save their mercantile credit and thus be enabled to go on with their speculations and thus expected to pay their loans in the depreciated currency which they had themselves produced by the suspension and you will remember what a struggle they made for it. They have succeeded in obtaining delay and have used the means they obtained by this forced loan from the public to pay their debts in England and maintain their credit there. More specie has been shipped by them four times over than would have paid their debts to the public, and while the government suffers this forced loan to remain unpaid and the merchants are trading upon it and profit by it, depend upon it, the Banks will not and cannot resume. There will be no return to a sound currency, until the merchants are compelled to pay their bonds and no efforts of the government or the Banks can do it, until this is done. The merchants that are solvent can easily get the money and upon the score of justice, they have not the shadow of a claim to further indulgence. Make them pay and you will find their Banks paying also. This was the case in 1816 and 1817. It was the resolute determination of the Treasury Department to enforce the payment in specie that produced the return to the specie currency. The same course will again produce the same effect and with far less inconvenience, for there is an abundance of specie in the country and more will come in the course of trade, if more is needed, as soon as the specie circulation is secured. There are many other views which I would be glad to present to you on this point, but I am extending this letter to an unreasonable length.

"It is not, I think, advisable to repeal the law respecting the October installment of the deposite with the states, nor to suspend its payment. If the merchants pay their bonds, there

will be money enough for next year's expenditure and, upon the question whether the merchants shall keep it or the states, justice as well as policy is on the side of the latter. You know how decidedly I was opposed to the deposite with the states, which was a distribution in effect and intended to be so. But the law has passed and the money for the instalment is in Banks. These Banks do not pay specie and the general government will have endless trouble in recovering the money and settling its accounts with the Banks, if the October instalment is not paid to the States. Yet you will find the states for the most part willing to take it as it is and these Banks being State institutions, the States will be able to manage the business with them much more advantageously than the general government. If the instalment is not paid to the states, the General government will, for years to come, find itself embarrassed with the old item of unavailable funds and I see no good to result from the repeal of the law. If the merchants are required to pay their bonds, you will have enough for the economical wants of the government, without new taxes or loans, and the revenue of 1838 will be more than the government will want for the year. Indeed, in the present state of things, I think it fortunate that you have another instalment to pay to the States.

"As to the third point, in relation to the issue of Treasury notes, etc., the plan suggested appears to me to be much too complicated and you must excuse me for saying a little mystified. The government unquestionably goes for a restoration of the specie currency. This being the case, nothing should be furnished as paper currency because any such currency would obviously become a substitute for specie and retard and perhaps finally prevent its return to circulation. That specie can be had, and will be had whenever it is wanted, is proved by the immense shipment to Europe. The simple state of the case then is this: The Government owes money which from the misconduct of its agents, it cannot at this moment pay and it, moreover, wants money for its ordinary operations. Let it give its notes (Treasury notes) payable in twelve months

with interest, receivable everywhere in payment of government dues. This is plain and ordinary settlement between debtor and creditor, with this difference,—that the note of the government would, to the creditor be equal to specie itself and he will be perfectly satisfied with the arrangement. In this mode, there will be no danger of over-issues, no speculations founded upon it, no paper currency to drive gold and silver from circulation and familiarize the people to the use of paper. And the duties and sales of lands being settled in specie, the government, by the end of the next year, will be able to pay off its notes, or, if not at that time; provision would then be made. I would cautiously avoid everything that looked like the creation of a paper currency, even for a temporary purpose. Let it once get root and it will continue to grow and spread, until it overshadows the land and poisons everything in its shade. There is specie enough in the country, or ready to be brought in when needed to carry on all the business of the country with perfect convenience. I speak of course now merely of the restoration of the currency as it stood before the suspension, without meaning to speak of ulterior measures in relation to the currency which may hereafter come under the consideration of the government.

"As to the plan of keeping the public money in the Sub-Treasury with the collectors, receivers, etc., or by officers specially appointed for the purpose, I think it will not answer. There are mighty objections to it in principle and experience has shewn that it is not expedient. I will state some of the leading ones briefly:

1. It will increase greatly the patronage of the government for, even if it is confined to the officers already established, such as collectors, receivers, postmasters, it makes those officers far more important than they now are and, thereby, adds to the weight of executive patronage and however particularly that patronage would be ever used by those now in office, yet, if the corruption which has so long struggled for power should succeed in placing one of its instruments in the Executive chair,

every increase of its power to purchase support would make it more difficult for the people to dislodge them.

2. The scheme wants the checks and securities, which should always be required for the safety of the public money. The officers are constantly liable to the seductions of friends, or supposed friends, and surrounded with temptations to which weakness may yield, even when no real fraud upon the public is intended.

3. Experience has proved how dangerous it is to leave large sums of money in the hands of District Attornies, collectors, receivers, and postmasters, and the legislation of Congress and the instructions of the Treasury Department from time to time shew how sensible this evil has been felt and how necessary it has been thought to adopt measures to prevent large sums of public money from remaining long in the hands of an individual officer.

4. The public have more confidence in the conduct of corporations, whose proceedings are known to many and whose books and accounts are liable to examination, than they have in individuals. Even now the notes of Banks are taken in preference to the notes of any individual and we daily see property bought and sold for Bank notes and see investments made in Bank stocks, notwithstanding they have suspended specie payments. During the last war, bank notes were taken, when the notes of the Government were refused, although the banks did not pay specie. And in the deposite of the public money, it is of the first importance that the public should be satisfied that it is safe and that no improper use will be made of it. It would not be advisable to give the adversary an opportunity of again clamoring about the purse and the sword, by proposing to place the public money in the keeping of persons dependent on the Executive when any other safe depository can be found.

"My plan would be this.—Let Congress authorize the Secretary of the Treasury to select as many Banks as he may find necessary as depositories make the deposite a *special deposite*

to be all in specie, not to be touched for any purpose but upon the order of the proper office of the government, take security for the faithful keeping and disbursement of the money and inflict penalties for a violation of duty. In a word, place the public money in deposite, in truth and in fact, and do not, as was done by the present law, under the name of deposite, leave it to the Banks on interest, so as to make them borrowers and not depositories. But few Banks would be necessary upon this plan and the government would have to pay them a moderate commission for the receipt and disbursements of the money, not exceeding annually some certain sum to be named in the law. This plan would be found safer and cheaper than the one suggested and would, in my opinion, command more of the public confidence. It is analogous to the plan originally adopted, when the deposites were removed from the Bank of the United States, with this difference that the obligation to keep the public money in specie will be absolute and fixed and the amount of specie to be held for the public use will not depend on the discretion of the Secretary. It was a vital principle in the original plan that no interest should be charged on the deposites because the Secretary retained the right to order such proportion of the public money as he thought necessary to be kept in specie and not traded on by the Bank. But the charge of interest converted the deposite at once into a loan and by necessary implication gave the Bank the right to lend out the public money. Consequently, it took away all power of supervision on the part of the Treasury; for supervision in a matter of that sort is nothing without the power of control. It was a monstrous absurdity in the government after taking so much pains to have its revenue collected in specie the moment it was collected to convert it into paper, by lending it to Banks to be lent by them to traders and speculators and this too for the miserable gain of two per cent. Experiment has, however, shewn that if even a moderate use of the public money is allowed for the purpose of trade, the Banks will run unto excesses, and the true principle is that the public money

in the hands of all public agents should be a sacred trust, never to be touched except for public purposes, sanctioned by law and it will not be safe, unless this principle is rigidly adhered to and no banking or trading upon it permitted. There will be no difficulty in remitting money to any point where the government requires it. The draft of the Treasury Department will command the money anywhere, for exchanges will always be in favour of the places where commerce centers and where the large amounts of revenue are collected. What is collected in the west will be needed in the west or can be remitted without inconvenience or loss to New Orleans and the importance which has been attached to this service is merely fanciful and without real foundation. As to domestic exchanges and trade, the government should have nothing to do with them. The merchants have no more right to peculiar favors than any other class of citizens and they ought to be brought to make their own arrangements for their own business and exchanges and not be allowed to impose burthens on the government for their peculiar benefit when those burthens are borne by the rest of the community.

"5. The revenue, I think, should be collected exclusively in gold and silver and such obligations as the government itself may be obliged to issue. And no paper of any Bank of any description should be received or paid away by the government or in any manner used in its fiscal operations. It is idle to talk of specie paying Banks. They may be specie paying to-day and bankrupt to-morrow.

"6 and 7. I can form no opinion as to the time proper to be given to the Banks, as I have not the facts upon which correct judgment must be formed. I can only repeat that so long as the Government indulges the merchants, so long it will be necessary to indulge the Banks, but not a moment longer. Remember that although the merchants and traders control the operations of the Banks (with the exception of the Bank of the United States) yet they hold but little of the stock. The great mass of it is held by a very different class of people

who are themselves among the victims of speculating cupidity and whose property is often put to hazard to support tottering mercantile houses or gratify the friends of the Directors and if the government presses upon the Banks, while it spares the merchants, it will throw the burthen of the present times upon an innocent class of persons, instead of leaving it to be borne, as it justly should be, by those who have produced it and who, after producing it, are endeavoring to throw it upon other people. As I am talking to you about stockholders in Banks and Mr. Clay once tried to make a noise about a few shares I then held in the Union Bank of Maryland, it is due to you and to myself, to apprise you that I do not now hold a single share of stock in any Bank, nor do I owe any Bank a single dollar.

"I have now, my dear sir, presented to you, as briefly as I could, my notions on the points to which you called my attention. You will judge whether they are worth anything. In a few days, I hope to see you in person. I must be at Washington on the first Monday in August and hold a court, which will not occupy five minutes, and as soon as the duty is performed shall pay my respects to you.

"You say that my answer to your letter shall be as private as I desire. You know the delicacy of my position and I submit it to your discretion and friendship and am quite sure that it will not be made known to any one who is not worthy of the confidence."

A postscript adds: "Your letter with the one enclosed have been burnt and I keep no copy of this."

53 HOME OF CHIEF JUSTICE TANEY, (VIEW OF KITCHEN), FREDERICK, MARYLAND

OA2964

POST CARD

THE ROGER BROOKE TANEY HOME
AND MUSEUM

The old kitchen has the original bake oven and is equipped with century-old utensils. It is located in the slave quarters apart from the main dwelling.

Marken & Bielfeld, Inc., Frederick, Md.

National Republic, 1930

Visiting the Taney Home

Home of Famous Jurist Who Inaugurated Seven Presidents and Rendered Dred-Scott Decision Is Now a National Memorial

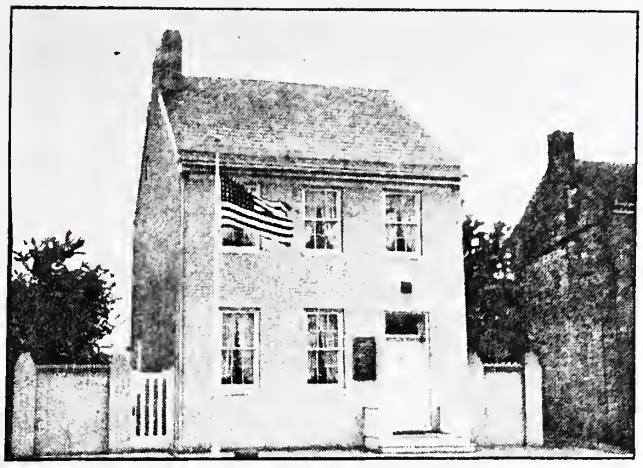
By EDWARD S. DELAPLAINE,

President, Roger Brooke Taney Home, Inc.

ON APRIL 15, 1930, the home of Roger Brooke Taney in Frederick, Maryland, was opened as a national shrine. A tablet has been placed on this modest dwelling with the following inscription:

"In This House Lived
Roger Brooke Taney,
Chief Justice
of the Supreme Court
of the United States,
and His Wife,
Anne Key Taney,
Sister of
Francis Scott Key,
Author of
"The Star-Spangled Banner."

Already the little home, with its quaint old wine cellar and slave quarters, has been visited by thousands of tourists from all parts of the United States. Within the first few weeks visitors also registered from Germany, Scotland, China and Denmark. It is an appropriate memorial to a great jurist.



Front View of the Roger Brooke Taney Home at Frederick, Maryland

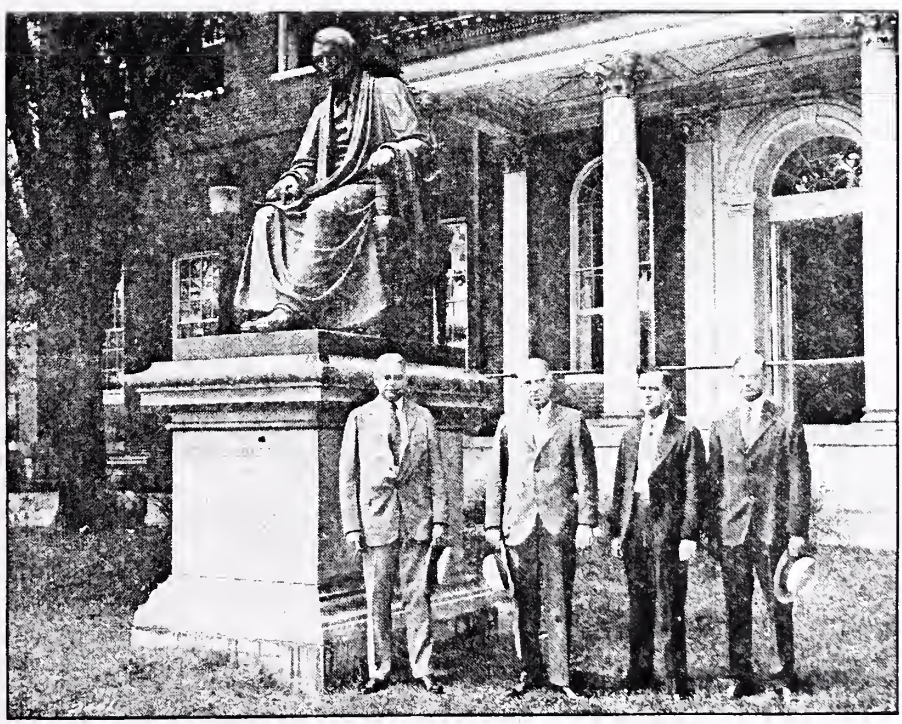
Moreover it is a mecca for admirers of the distinguished lawyer and poet, Francis Scott Key, whose song of victory written at the time of the bombardment of Fort McHenry is now sung throughout the nation as the anthem of American patriotism. It was to Frederick that Key sent his family at the time of the British invasion, and it was here that he came after the repulse of the invaders and related to Taney how he happened to write the stirring anthem.

The main facts in the life of Roger Brooke Taney are as follows:

1777—Born in Maryland;
1795—Graduated from Dickinson College;
1799—Admitted to the bar and elected to the legislature;
1801—Commenced the practice of law in Frederick;
1806—Married Anne Key, the sister of Francis Scott Key;
1816-1821—Member of the Maryland State Senate from Frederick County;
1827-1831—Attorney General of Maryland;
1831-1833—Attorney General of the United States, by appointment of President Andrew Jackson;
1833-1834—Secretary of the Treasury;
1836—Became Chief Justice of the Supreme Court of the United States, succeeding John Marshall;
1857—Delivered the decision in the famous Dred Scott case;
1861—Administered the Presidential oath to Abraham Lincoln;
1864—Died in Washington.

These are the main facts in Francis Scott Key's life:

1779—Born in Maryland;
1796—Graduated from St. John's College;
1800—Commenced the practice of law in Frederick;
1802—Married Mary Lloyd in Annapolis;
1807—Argued his first case in the United States Supreme Court as counsel for two men accused of treason as the messengers of Aaron Burr;
1814—Wrote "The Star-Spangled Banner" at the time of the British attack on Baltimore;
1816—One of the organizers of the American Colonization Society;
1831—Urged Roger Brooke Taney to enter Jackson's cabinet as Attorney General;
1833—Appointed by President Jackson United States District Attorney for the District of Columbia, and at the President's direction went on a special mission to Alabama to help settle the controversy between the civil and military authorities over the Creek Indian lands;
1834—Guest of honor with Taney at historic banquet in Frederick;
1842—Delivered his last and most memorable speech on slavery before the Colonization convention;
1843—Death in Baltimore.



Incorporators of the Taney Home at Taney Monument, in Front of Colonial State House, Annapolis—Governor Ritchie at the Left

THE Taney home was built about the year 1799. Approaching the front of the house, the visitor's attention is drawn to its Georgian architecture, plain in style but with a touch of refinement given by its attractive cornice and colonial door and transom—the same threshold Taney and his wife and daughters entered over a century ago.

Entering the drawing room, the visitor sees the painting of the dramatic inaugural of 1861, when Chief Justice Taney administered the presidential oath to Abraham Lincoln that he would "preserve, protect and defend the Constitution of the United States." This great painting is the work of the distinguished artist, Henry Roben. It depicts not only the Chief Justice and the Emancipator and the Clerk of the Supreme Court hold-

ing the Bible, but also retiring President Buchanan and a surrounding group of prominent figures attending the inaugural.

On the walls of the same room are also steel engravings of all the Presidents whom Chief Justice Taney inducted into office—Martin Van Buren, William Henry Harrison, James K. Polk, Zachary Taylor, Franklin Pierce, James Buchanan and Abraham Lincoln—seven in all, more Presidents than were inaugurated by any other man in American history.

Kitchen Showing Rare Bake Oven

AMONG the thousands of persons who have visited the old home of Chief Justice Taney there is not one who has not been intensely interested in the old kitchen and its original bake oven, the wine cellar with its barrels and bottles of a century ago, the smoke house, negro work shop and slave quarters; but back of it all, to the thoughtful student of history, is the strange paradox that while Taney was reviled for his opinion in the Dred Scott case he himself was opposed to slavery.

Under the Constitution could a negro, the descendant of slaves, become a citizen of a state or of the nation? Taney answered in the negative. Did the fact that Dred Scott and his wife lived at Fort Snelling in the Louisiana Purchase make them free? The Missouri Compromise said so; but the Constitution gave to Congress no authority to pass such an act. The power given to Congress to make all needful rules and regulations respecting the territory belonging to the United States had reference only to "territory which at that time belonged to, or was claimed by, the United States." Thus Chief Justice Taney declared that the Missouri Compromise was not warranted by the Constitution and was void.

Lincoln declared in his Springfield speech on June 26, 1857: "We think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."

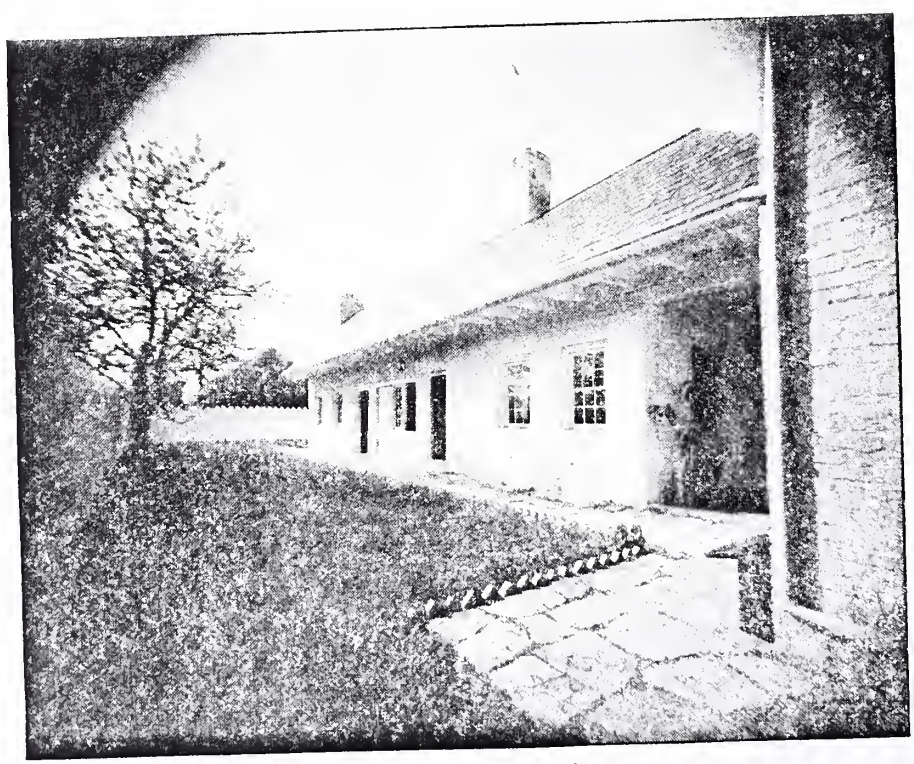
Other anti-slavery leaders were more outspoken than Lincoln. Taney was denounced with scurrilous criticism. One of the exhibits in the Taney home today is a copy of Horace Greeley's book, *The American Conflict*, in which Taney is assailed for disregarding all the principles of law, all the principles of reason, and all the principles of humanity.

BUT Chief Justice Taney bore the flood of villification with remarkable tranquility. In a letter to former President Pierce he said: "At my time of life when my end must be near [Taney wrote the opinion in the Dred Scott case when he was eighty years old] I should have enjoyed to find that the irritating strifes of this world were over, and that I was about to depart in peace with all men and all men in peace with me. Yet perhaps it is best as it is. The mind is less apt to feel the torpor of age when it is thus forced into action by public duties. And I have an abiding confidence that this act of my judicial life will stand the test of time and the sober judgment of the country."

The paradox in Taney's life comes vividly before the eyes of the visitor at the Chief Justice's home when he sees on the white-washed walls of the slave quarters the manumission papers showing that Taney set his own slaves free.

And before leaving the shrine the visitor's attention is also directed to the original docket entry in the Gruber case, in which Rev. Jacob Gruber was charged with attempting to instigate negro slaves to "commit acts of mutiny and rebellion in the state," and in which Taney, as one of his counsel in 1819—thirty-eight years before the Dred Scott decision—declared that slavery was a blot on our civilization.

"A hard necessity, indeed," said Taney in this early case, "compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet, while it continues, it is a blot on our national character; and every real lover of freedom confidently hopes that it will effectually, though it must be gradually wiped away; and earnestly looks for the means by which this necessary object may be best attained. And until it shall be accomplished, until the time shall come when we can point without a blush to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave."



Exterior View of Slave Quarters

Whoever is right, the persecutor must be wrong.—*William Penn.*

In March, 1858, Senator Seward accused Taney and Buchanan of conspiracy. He charged that Dred Scott had been used as a mere "dummy" in a political game.

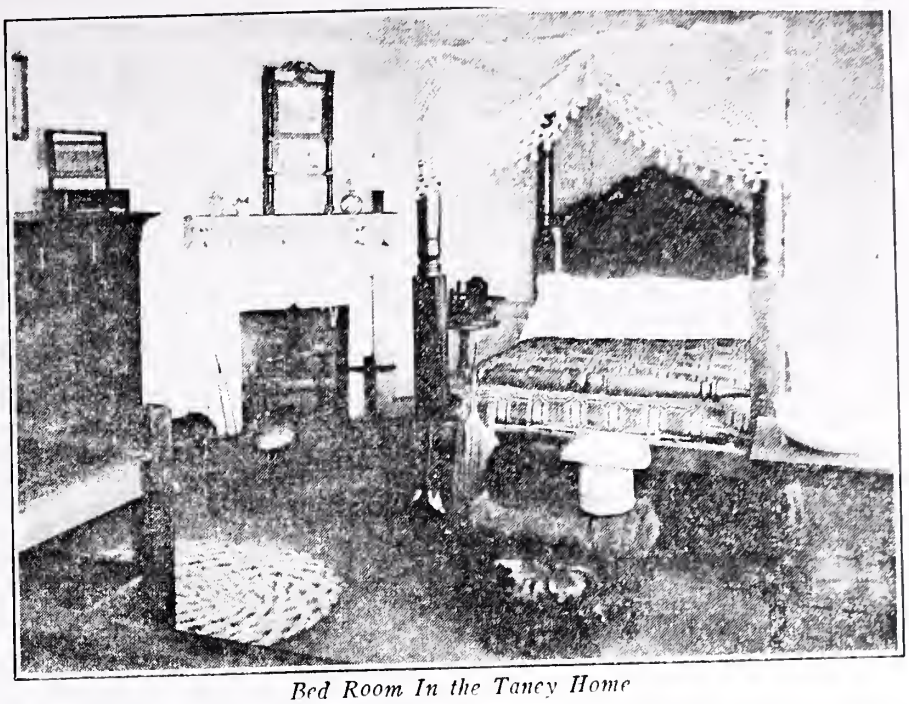
In June, 1858, Lincoln delivered his famous speech declaring "The house divided against itself shall not stand." In this speech the rail-splitter said: "Why was the court decision held up? * * * Why the delay for re-argument? Why the incoming President's advance exhortation in favor of the decision? These things look like the cautious patting and petting of a spirited horse preparatory to mounting him, when it is dreaded that he may give the rider a fall. And why the hasty after-endorsement of the decision by the President and others?"

Roger Brooke Taney erred in his prediction that the decision in the Dred Scott case would "stand the test of time and the sober judgment of the country." It only added fuel to the bitter controversy between the North and the South which was not decided until General Lee surrendered to General Grant at Appomattox.

James Ford Rhodes said that while Chief Justice Taney made an error, his environment gave him the Southern attitude; yet he deserves censure because he allowed himself to make a political argument, when only a judicial decision was called for.

In 1901, Justice Brown in the case of Downs *vs.* Bidwell, 182 U. S. 292, said: "The difficulty with the Dred Scott case was that the Court refused to make a distinction between property in general and a wholly exceptional class of property. Mr. Benton tersely stated that distinction, by saying that the Virginian might carry his slave with him into the Territory, but he could not carry with him the Virginia law which made him a slave."

In 1928, Frank H. Hodder of the University of Kansas said that the position that Chief Justice Taney took in the Dred Scott case was "the result of a mistaken sense of duty and not of any partiality for slavery."



Bed Room In the Taney Home

As a matter of fact, Taney was opposed to slavery, but he had been brought up in the tradition that slavery was a national institution and at the age of 80 it was difficult for him to change his opinion. Dr. Hodder, while not agreeing with the charge that Taney committed a "gross breach of trust" in the Dred Scott case, asserted that his opinion was rather "a fatal error of judgment."

At all events the decision of Chief Justice Taney revived the Republican Party. The Dred Scott case provided an issue just at the crucial moment. Upon this issue Lincoln was elected.

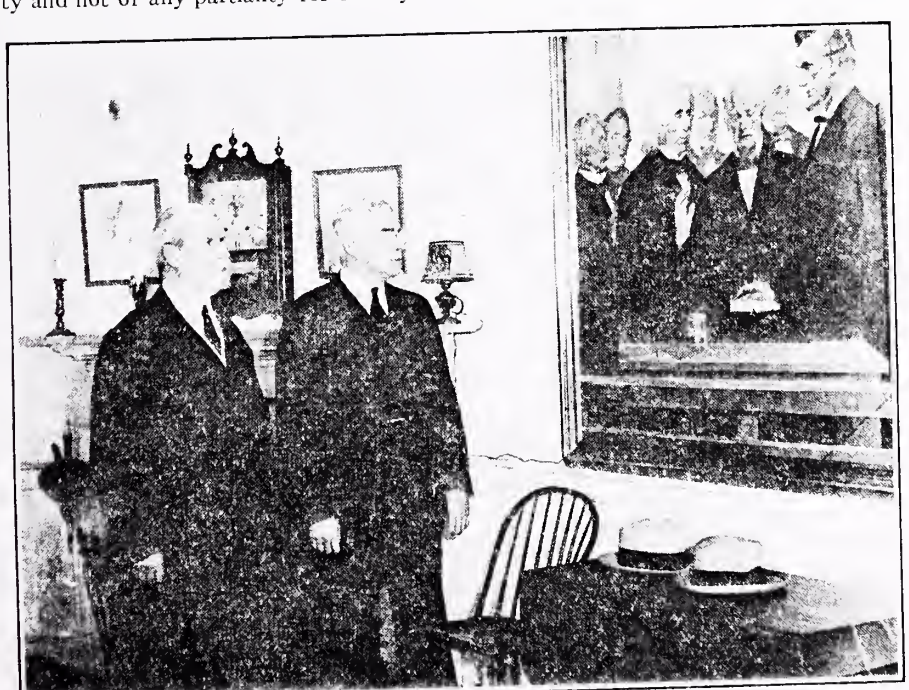
ENEMIES WITHOUT

Edward A. Hayes, national commander of the American Legion, chose wisely in making one of his recent addresses a warning to his comrades and to the American people of the inroads organized communistic activities are making in this country. He said, in part:

"We believe that it is time that the American people take a decided stand against some of the strange tenets that are spreading to destroy the principles of freedom and democracy upon which this nation was founded. The movement is spreading into our schools and colleges, into our churches and social organizations, even into official government circles, as shown by recent startling events."

Mr. Hayes was not referring to any "red" tendencies on the part of the administration. In fact, he denies they exist, and especially he warns his hearers against attributing any partisan motives to any of his utterances. What he is driving at is the organized communist assault upon American institutions, as more particularly exemplified in the series of strikes throughout the country which are part of the deliberate Moscow program; and he illustrates the situation when he says that on a recent trip to California he found the California Department of the American Legion in the throes of difficulty with an admitted set of communists in one of the most beautiful valleys of the state.

This is a reference to the special drive being made by the communists against the perishable products of California, whereby they hope so to disorganize local agriculture as to bring about complete ruin, and thus afford opportunity for the assertion of their control. Police have seized communist official orders for strikes throughout the truck and melon growing districts of California, and these, according to the *National Republic*, included information regarding a "strike school," in connection with which the organizer, one Harry Collentz, was arrested. Destruction of crops at red instigation in many of the agricultural states is reported, of which details could be given if there were space, and it is notorious that many of the industrial strikes which are disturbing the (*Continued on page 31*)



Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and Albert C. Ritchie, Governor of Maryland and Honorary Chairman of the Advisory Board of the Taney Home, Viewing the Roben Painting of Chief Justice Taney Inaugurating Lincoln as President of the United States

National Republic

Historic Shrine In Maryland

Thousands of Americans Have Visited Roger Brooke Taney Home at Frederick Since Its Opening to Public—Memorial to Chief Justice and His Brother-in-law, Francis Scott Key

By EDWARD S. DELAPLANE

SINCE the opening of the Roger Brooke Taney Home in Frederick, Maryland, in 1930, more than 20,000 people have visited this shrine, which is a memorial to Chief Justice Taney and his brother-in-law, Francis Scott Key, author of "The Star-Spangled Banner."

Taney served as Attorney General of the United States (1831-1833), Secretary of War *ad interim* (1831), Secretary of the Treasury (1833-1834), and Chief Justice of the Supreme Court of the United States (1836-1864-. In 1857 he wrote the decision in the Dred Scott case.

One of the questions which the hostesses at the Taney Home are frequently asked by tourists is, "What was the Dred Scott case?"

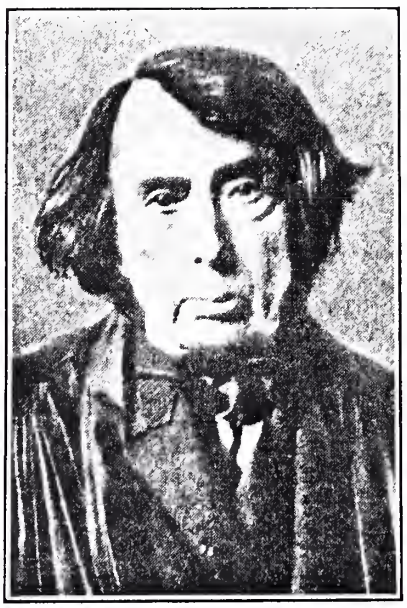
The title of the case, as found in the United States Supreme Court Reports is Dred Scott *vs.* John F. A. Sanford. It was decided by the Supreme Court at the December term of 1856.

In 1834 Dr. John Emerson, a surgeon in the United States Army, went from Missouri, a slave state. to Illinois, and later to Fort Snelling, an outpost in the Territory of Wisconsin. He took with him a negro slave named Dred Scott.

Ordered back to St. Louis, Dr. Emerson left Fort Snelling in 1837. With him went Dred Scott and a negro woman, Harriet, whom Dred Scott had married.

While on the steamboat on the Mississippi, before it reached the boundary of the state of Missouri, Harriet gave birth to a daughter. A second daughter was born after their return to St. Louis.

Dr. Emerson died in 1844. The negroes then became the property of his widow; but Mrs. Emerson moved to Massachusetts and left the negroes in St. Louis under the care of Taylor Blow, son of Peter Blow, who had been Dred Scott's master in Virginia.



Photograph of Roger Brooke Taney at the Time He Was Chief Justice

Taylor Blow was at a loss to know what to do with Dred Scott and his family. He took Dred Scott to the law firm of Field & Hall in the hope of finding some solution of the problem. The lawyers advised the negro to sue for his freedom. His contention was that under the Missouri Compromise Act (which prohibited slavery in the domain north of the compromise line, except the state of Missouri) he had been emancipated by reason of his residence in Illinois and in Wisconsin.

AFTER years of litigation, the case of Dred Scott finally came before the Supreme Court of the United States at the December term of 1856.

Chief Justice Taney held that negro slaves were not intended to be included within the meaning of the term "citizen" under the Constitution of the United States, and therefore had no right to sue in the federal courts.

After expressing this opinion, the Chief Justice nevertheless went on to discuss the provisions of the Missouri Compromise Act. By virtue of this statute the fact that Dred Scott lived in the territory acquired by the Louisiana Purchase made him free. But Taney held that Congress had no power to pass such an act. True, the Constitution authorized the Congress to make "all needful rules and regulations respecting the territory or other property belonging to the United States." But, said Taney, this power referred only to territory belonging to the United States at the time the Constitution was adopted.

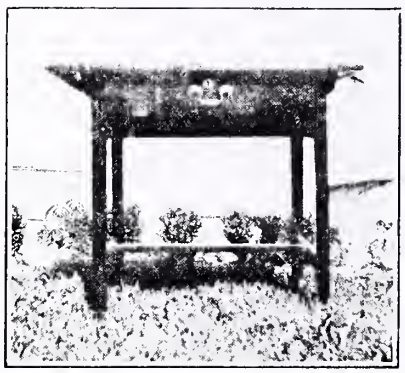
The effect of Chief Justice Taney's decision was therefore to decide that Congress had no power to destroy a property right merely because the owner took the property into free territory; that a negro slave was a chattel which under the Fifth Amendment of the Constitution could not be taken from its owner without due process of law; and that the Missouri Compromise Act was unconstitutional and void.

Six of the Associate Justices concurred with Chief Justice Taney. They were: Justice Samuel Nelson of New York, Justice James M. Wayne of Georgia, Justice Robert G. Grier of Pennsylvania, Justice Peter V. Daniel of Virginia, Justice James A. Campbell of Alabama, and Justice John Catron of Tennessee.

Dissenting opinions were written by Justice John McLean of Ohio and Justice Benjamin R. Curtis of Massachusetts.

Justice McLean stated that negroes could be "citizens" within the meaning of the Constitution. He also maintained that the language of the Constitution was plain in giving to Congress the power to regulate slavery in the territories. He asserted that he could not believe that a human being, even though a slave, was a chattel. Nevertheless, since the majority of the Court held that a slave was a chattel, he maintained that the Court had no jurisdiction to proceed to a consideration of the constitutionality of the Missouri Compromise Act.

Justice Curtis pointed out that when the Constitution was adopted free negroes, even though descended from African slaves, were included among the "citizens" of five states of the Union—New Hampshire, Massachusetts, New York, New Jersey and North Carolina. He maintained that a citizen of a state must also be a citizen of the United States. He declared that when the Constitution authorized Congress to make "all needful rules and regulations" for the territories, it meant all, and not some, rules and regulations.



Desk on Which Justice Taney Wrote the Dred Scott Decision

THE decision in the Dred Ccott case was handed down by the Supreme Court on March 6, 1857—just two days after the inauguration of Buchanan.

It immediately widened the breach between the North and the South. Horace Greeley denounced it in the *Tribune* as an opinion that deserved no more respect than if made by a "majority of those congregated in any Washington bar-room."

Lincoln, in reply to Stephen A. Douglas, said, "But we think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it."

Chief Justice Taney acted with high-minded purpose in an attempt to fend off possible war. But his opinion was soon condensed into an aphorism which obtained great currency in the North—"that negroes had no rights which the white man was bound to respect."

Northern lawyers pointed out that while the decision of the Court concerning Dred Scott was of legal obligation, the lengthy discussions concerning the status of slavery in America were merely *obiter dicta*.

1934

Lincoln's And Harding's Among The More Dramatic Of The Inaugurations

This is the second of three articles on Presidential inaugurations.

WASHINGTON, Jan. 12.—(A.P.)—Poignant, nation-stirring drama more than once has attended the inaugural pageants of the Presidents.

When Abraham Lincoln came to Washington for his first inauguration, the Nation was on the brink of civil war, seven states already had left the Union and a heavy atmosphere of anxiety hung over the capital. It was said that three-fourths of the city's inhabitants regarded the incoming Chief Executive as an enemy.

Lincoln Faced Danger.

There were rumors of plots to assassinate the President-elect, to seize Washington and to blow up its public buildings. En route to the capital, Lincoln was induced by Secret Service operatives to change his travel schedule in order to avert assassination. He left Harrisburg, Pa., secretly at night on a special train, traveled incognito through hostile Baltimore and slipped quietly into Washington at 6:05 in the morning.

His carriage surrounded by soldiers and with Government marksmen on the roofs of houses training their guns on Pennsylvania Avenue, the "great backwoodsman" rode from Willard's Hotel to the Capitol to swear that he would preserve the Union.

Wilson Exit An Ordeal.

The inauguration of Warren Harding was made dramatic by the tragic exit from the Presidency of Woodrow Wilson, his health broken and his vision shattered of leading the United States into a concert of the nations to preserve peace and democracy.

Murmurs of sympathy mingled with the cheers as the crowds caught sight of the disease-wasted and strife-weary figure of the war-time President, sitting beside the vigorous and ruddy President-elect in their ride to the Capitol.

Descending the White House steps for the last time, Wilson was assisted by Secret Service men who placed his feet on each step and then on the running board of the automobile. At the Capitol the President signed some bills and chatted with attempted gaiety.

Avoided Ceremonies.

Finally he yielded to entreaties of his family that he spare himself the ordeal of the inaugural ceremonies. He and the President-elect clasped hands, and Harding said: "Good-bye, Mr. President. I know you are glad to be relieved of your burden and worries."

Yet the Ohioan was the first of the two to die.

As Wilson walked falteringly to his car he remarked to Senator Knox, of Pennsylvania: "The Senate has thrown me down, but I am not going to fall down." He was referring to the Senate's defeat of his proposal that the United States enter the League of Nations.

As the automobile sped by the White House on the way to his private home in S Street, Wilson never glanced at the mansion which had been his home during eight highly dramatic years.

Dramatic because of its extremely humble, homespun setting was the first inauguration of Calvin Coolidge, who took the oath of office at 2:47 in the morning in the lamp-lighted sitting room of the Vermont farm house where he was born.

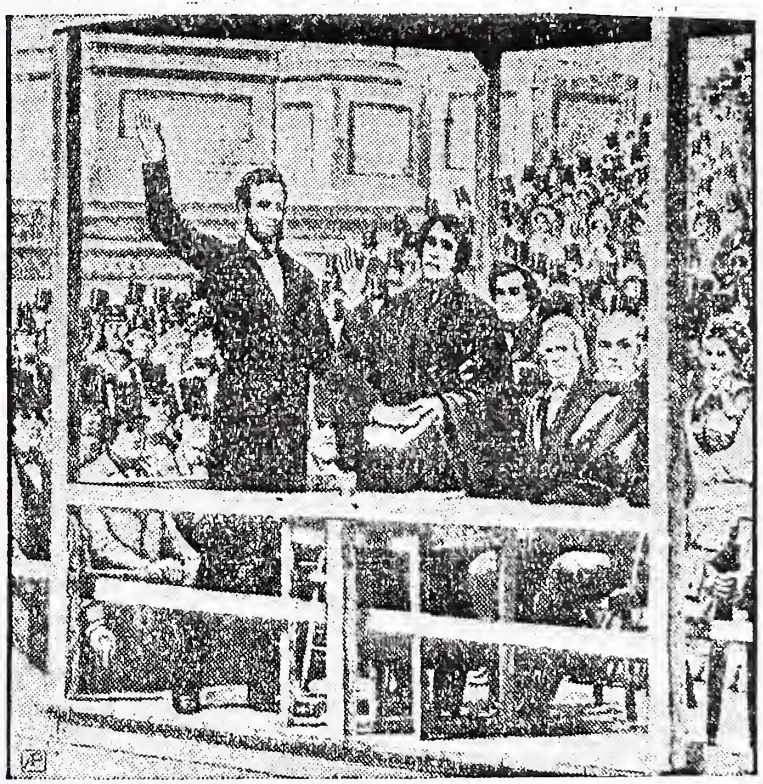
Oath Given By Father.

Called from his sleep by a message telling of the death of President Harding in San Francisco, Coolidge had dressed quickly. A trifle pale but composed, he walked down the old stairway of his boyhood days into the sitting room. Mrs. Coolidge, weeping, followed him.

Coolidge's father administered the oath. The new President stood with right hand upraised at one side of a little table with Mrs. Coolidge beside him. Across the table his father, face beaming and voice trembling, read the few words of the oath, "to preserve, protect and defend the Constitution of the United States."

And Calvin Coolidge, parsimonious of speech, added: "So help me, God."

(Next: Inauguration Weather.)



LINCOLN BECOMES PRESIDENT

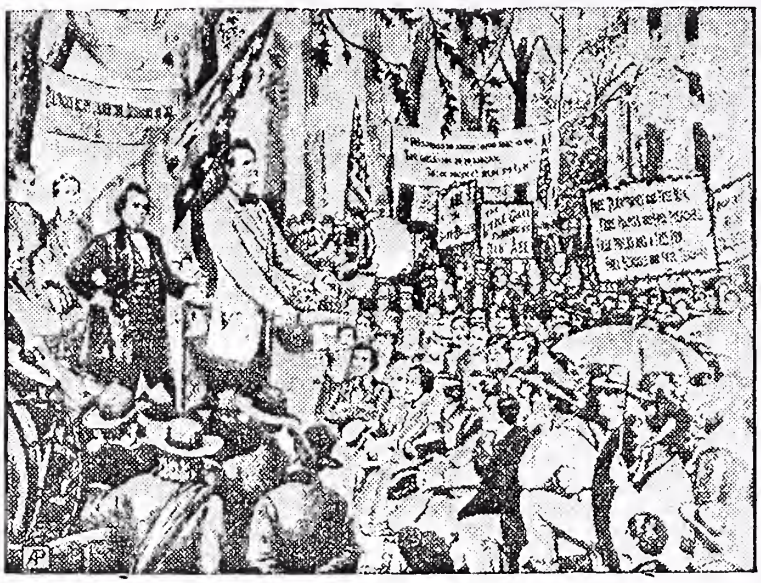
Accompanied by a heavy guard, Abraham Lincoln slipped into a Washington rife with rumors of assassination plots and took the oath of allegiance for the first time in 1861 in a crude wooden enclosure while the high hats of the day looked on.

The Presidents vs. the Supreme Court

Lincoln Bests Taney in Three Rounds

HE STARTED IT . . .

Chief Justice Roger B. Taney brought the slavery issue to a head when, in his Dred Scott decision, he held a slave remained a slave even when taken into free territory.



HE CARRIED THE FIGHT TO THE COUNTRY . . .

Lincoln, in his historic debates with Stephen A. Douglas as a candidate for the Senate, expressed his reverence for the Supreme Court but challenged Taney's legal logic. "We think," he said bluntly, "the Dred Scott decision is erroneous." Taney held his ground, and a few months after the Civil War started locked horns with Lincoln again.

AND HE WON

Public opinion in a majority of the states eventually supported Lincoln in his opposition to slavery, but it took a bloody war to impress that view upon the South.

By MORGAN M. BEATTY

(Third of a Series)

Washington, Feb. 18—(AP)—Abraham Lincoln got all the best of his struggles with the Supreme Court, and he used them to score three complete victories.

The groundwork for Lincoln's belligerence, ironically enough, was laid by the Supreme Court itself in the ill-starred Dred Scott decision four years before the Civil War.

The ruling was written by the same Roger B. Taney that Jackson had elevated to the highest tribunal twenty years before. Taney was close to his eightieth year and the possessor of sound mental and physical health when his decision was written that left Dred Scott in servitude and, in effect, validated slavery north of "36-30" on the ground that the Missouri compromise was unconstitutional.

Senatorial Candidate Lincoln caught the issue early out in Illinois and used it to the hilt against Douglas in their famous debates. The lanky Illinois lawyer announced boldly the nation should decline to abide by the decision.

Lincoln Speaks Out

"We think the Court's decisions, when fully settled, should control not only the particular cases decided but the general policy of the country," he argued. "But we think the Dred Scott decision is erroneous."

The towering Taney, austere, now somewhat stooped, but firm, silently held his ground, and it is small wonder that the war was only a few months old before he ran into trouble with the equally determined Lincoln.

The first skirmish came when the military forces arrested Jahn Merryman and imprisoned him in Fort McHenry, near Baltimore, on charges of raising rebel forces.

The prisoner asked for a writ of habeas corpus and got it from Taney, who was sitting as Circuit Court Judge. By authority of Lincoln, the Army declined to produce the prisoner. Promptly Taney held the Fort McHenry command in contempt. This decision likewise was ignored.

Taney Strikes Back

The Chief Justice then proceeded to write an opinion pointing out that the civil courts were still clothed with full authority. He sent a copy to the President.

Shortly after he took this decisive step, the eighty-four-year-old Justice remarked on leaving home for court one day:

"It is likely I will be imprisoned at Fort McHenry myself before nightfall, but I am going to court to do my duty."

Lincoln merely obtained an opinion from his Attorney-General that the President, as commander-in-chief of the Army, was acting for the public safety. Taney's orders were ignored.

Meanwhile, the harassed President was absorbed in the war, and allowed three vacancies to accumulate in the high tribunal by 1862.

Lincoln Wins

Whatever the reason, Lincoln suddenly turned his attention to the empty seats, and sent the Senate three nominations which were approved in rapid order.

Before the Court were the famous "prize cases," involving the right of the Union to blockade Southern ports. When the decision came down, Lincoln's three new Justices swung the tide, and the Union won. The margin was 5 to 4.

The third and last encounter between the Lincoln administration and the tenacious Taney was a minor difference over the deduction by the Treasury of 3 per cent of the Justices' salaries—part of a government-wide war economy measure.

Taney protested in vain.

"I see no hope," he wrote despairingly to a friend, "that the Supreme Court will ever again be restored to the authority and rank which the Constitution intended to confer upon it."

Score Stands Even

The fact remained that Lincoln gained his immediate ends—and the Supreme Court was discredited temporarily in the public eye. Years were to elapse before the greatness of Taney as a Chief Justice would be recognized.

The score of the contests between the Supreme Court and the Presidents then stood at two-all, and one draw. Washington and Jefferson had lost; Jackson and Lincoln had won.

Historians may argue at length about the draw, but the fact remains that both sides could claim a victory. The contenders were President Martin Van Buren, Jackson's political heir to the White House, and a much younger Roger B. Taney.

Van Buren charged the Court was invading executive authority when it awarded damages to postal contractors whose contracts had been revoked by Jackson. But his pride was salved when the Justices found occasion not long afterward to assert the President's authority was inviolate in his performance of executive duties.

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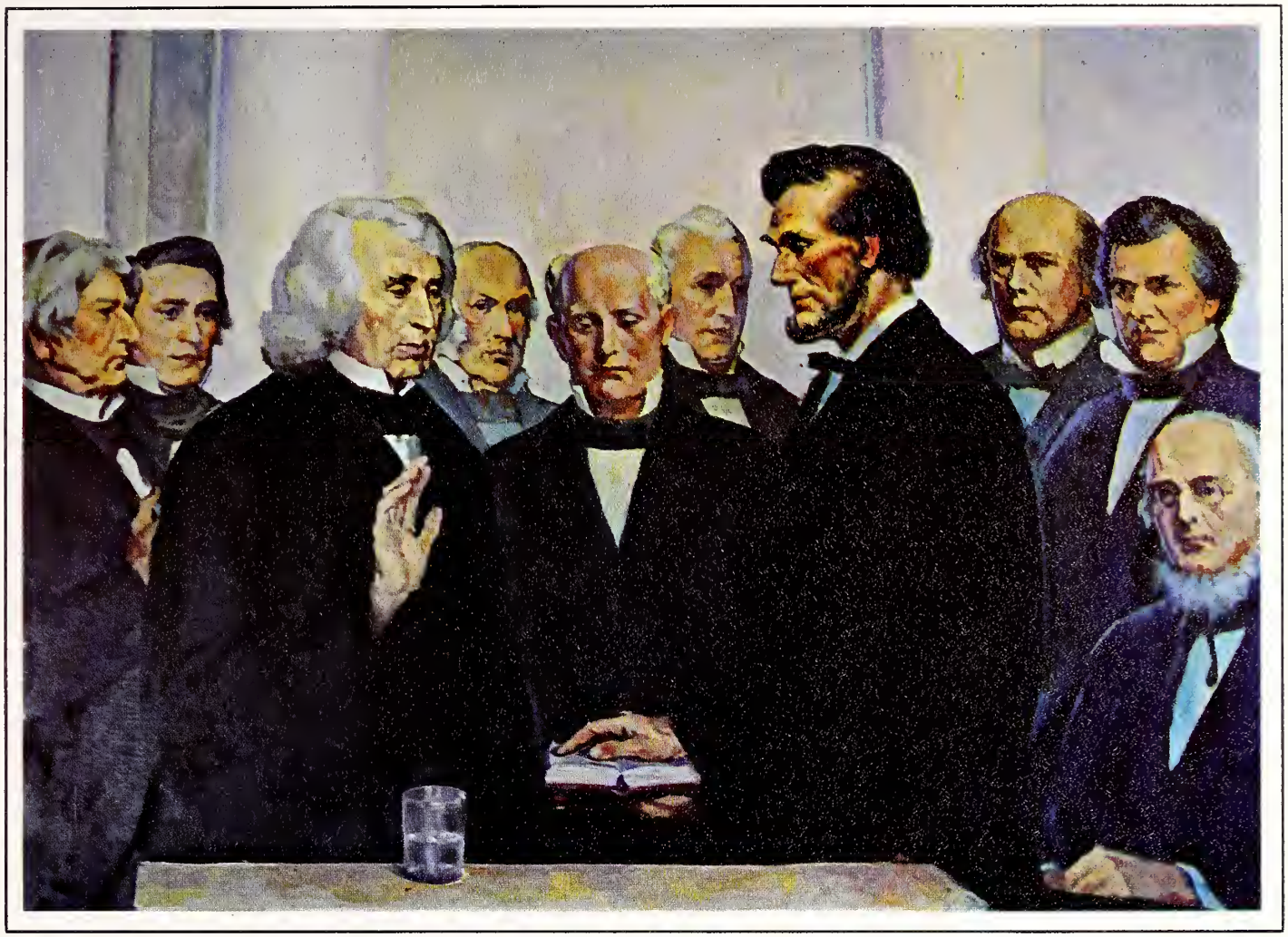
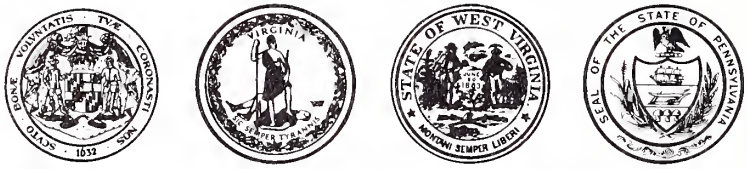
Winter 1966



VALLEYS of HISTORY



VALLEYS of HISTORY

VOL. 2 WINTER, 1966 NO. 1

Donald L. Whipp, Editor

Stuart L. Mullendore, Art Editor

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COVER

Henry Roben oil painting of Chief Justice Roger Brooke Taney swearing in Lincoln as President of the United States. Taney administered the oath of office to six other Presidents. Painting is in the Taney home in Frederick, Md., and was photographed through the courtesy of the Frederick County Historical Society.

Shown in the picture from left are William H. Seward, Secretary of State; John C. Breckinridge, retiring Vice President; Taney; Edward D. Baker, who introduced Lincoln to the inaugural crowd; William T. Carroll, clerk of the U. S. Supreme Court (holding the bible); James Buchanan, retiring President; Lincoln; Salmon P. Chase, Secretary of the Treasury; Stephen A. Douglas, one of Lincoln's opponents for the Presidency; and Horace Greeley. Picture on page one is from the author's collection.

Published quarterly to preserve the history and culture of the Potomac and Shenandoah Valleys—the cradle of this nation when it was young and the area that helped guide its development—by the AREA DEVELOPMENT DEPARTMENT, POTOMAC EDISON COMPANY, 55 E. Washington St., Hagerstown, Md., 21740. An investor-owned, tax paying electric utility company. Subscription $1 annually.

ROGER BROOKE TANEY

The Frederick Lawyer Who Became A Great Chief Justice

by Judge Edward S. Delaplaine

It is generally accepted by legal scholars that Roger Brooke Taney, the fifth Chief Justice of the United States, was one of the greatest American jurists. Yet he went to his grave in Frederick, Md., in October, 1864, as the most furiously reviled jurist in our history. The chief reason for his infamy was his opinion in the Dred Scott case in 1857.

Immediately after the decision, Horace Greeley's *New York Tribune* declared it deserved "just so much moral weight as would be the judgment of a majority of those congregated in any Washington barroom." Shortly afterwards the *Tribune* printed this brazen attack on the Chief Justice:

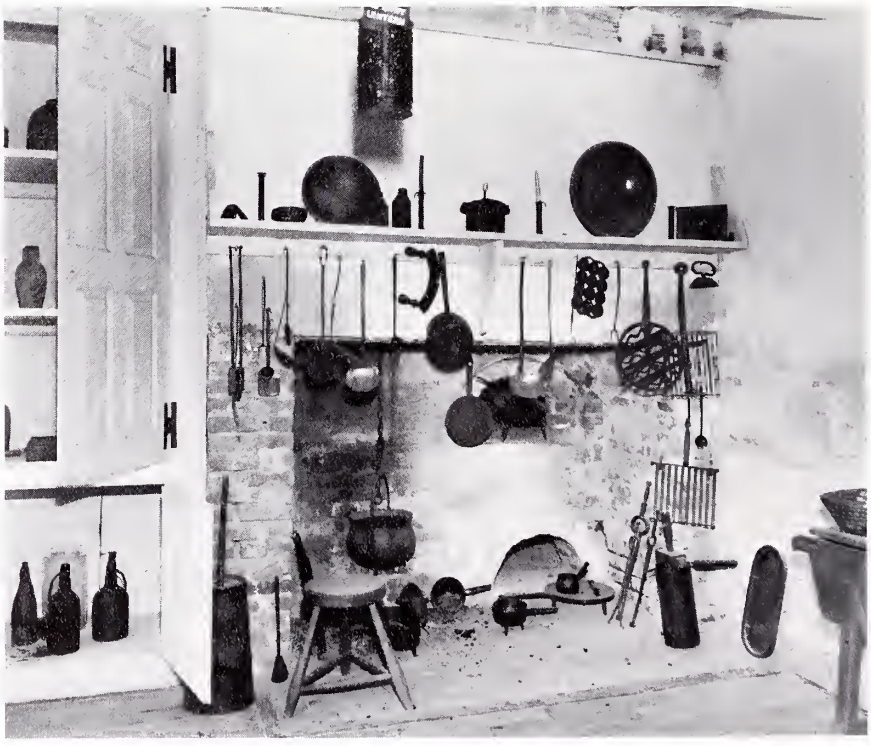
> *"Taney's opinion will be found to exhibit all the characteristics that have marked his career. It is subtle, sophistical and false. It is the plea of a tricky lawyer and not the decree of an upright Judge. . . . He walks with inverted and hesitating steps. His forehead is contracted, his eye sunken and his visage has a sinister expression."*

In the Senate of the United States, the Chief Justice was savagely denounced. One of the senators called the decision in the Dred Scott case "an outrage upon the civilization of the age and a libel upon the law." Another senator called it "the greatest crime in the judicial annals of the country."

Judge Edward S. Delaplaine, a resident of Frederick, is a former Associate Judge of the Court of Appeals of Maryland. He has served his city, county, state and nation in a number of other offices; and in 1958 he was a member of the Maryland and Virginia Potomac River Commission, which drafted the Potomac River Compact at Mount Vernon. He was president of the corporation that purchased and restored Taney's home in Frederick and gave it to the Historical Society of Frederick County. His published works include: ROGER B. TANEY, THE LAWYER; THE LIFE OF THOMAS JOHNSON; FRANCIS SCOTT KEY, LIFE AND TIMES; and MARYLAND IN LAW AND HISTORY.

Photos by A. Aubrey Bodine

Author is shown in the doorway of the Roger Brooke Taney home, a National Shrine in Frederick, Md. Taney lived here with his wife, the former Anne Key, sister of the author of the Star Spangled Banner. Photo at top right shows slave quarters in rear of the Taney home.



Fireplace with kitchen utensils and other household items on display in slave quarters of the Taney home.

In New York an anonymous writer published these defamatory words:

> *"As a man, a Christian and a Jurist, he falls below the lowest standard of humanity, religion and law recognized among civilized man. . . . As a Jurist, or, more strictly speaking, as a Judge, in which character he will be most remembered, he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment among men."*

It was outrageous that such vilifications should have been hurled at a man so religious, so learned in the law, so tolerant, so honest, and so kind. It was only natural that Chief Justice Taney, who was born in a slave State, did not agree with all the views of the abolitionists of the North, and wrote his opinion from the Southern standpoint. Born in Calvert County, Md., on March 17, 1777, he grew up in the atmosphere of the South.

In those days it was difficult to acquire an elementary education. Young Taney started to school in a log cabin three miles from his home, then attended a boarding school about ten miles away, and later had a private tutor. Shortly after the age of 15, he entered Dickinson College at Carlisle, Pa.; and there he received the degree of Bachelor of Arts in 1795.

Taney studied law in Annapolis and was admitted to the bar in 1799. He was elected to the Maryland House of Delegates, but he was defeated for re-election. Deciding to leave Calvert County, he moved to the town of Frederick in March, 1801, to begin the practice of law in that thriving community. One of the inducements to come to Frederick was Francis Scott Key, a young attorney, who had graduated from St. John's College and had studied law in Annapolis. Probably another inducement was Key's sister, Anne, for there were many times when Taney would visit Terra Rubra, the plantation of the Key family, where on Jan. 7, 1806, he would marry Anne.

For more than 22 years Taney practiced law in Frederick. During that period he developed into an able and vigorous lawyer. While he was not strong physically, he had a brilliant mind and an astuteness that enabled him to participate in a multitude of lawsuits, which frequently put him to bed with fatigue. He found it necessary to be unusually diligent to support his growing family. He had only one son, who died when only three years old; but he also had six daughters.

During the Frederick years, Taney was a devout member of St. John's Catholic Church. He was active in politics, but had no chance to hold public office in his first fifteen years at Frederick. In 1816 he entered the Maryland Senate. In 1818 the Legislature incorporated the Frederick County Bank, and he became a member of the bank's board of directors. For many years he served on the board of visitors of the Frederick Academy.

Among the cases in which Taney participated while he was practicing law in Frederick, the one that has attracted the most attention, because of the light it sheds upon his career as Chief Justice, was that of the Rev. Jacob Gruber. The grand jury of Washington County at Hagerstown, Md., had indicted Rev. Mr. Gruber, a Methodist minister from Pennsylvania, for attempting to incite slaves to insurrection and rebellion at a camp meeting near Hagerstown. The case was removed to Frederick County, and it was tried in the Court House in Frederick in 1819.

In speaking to the jury, as attorney for the accused, Taney uttered these memorable words:

> *"A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another Nation, while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet, while it continues, it is a blot on our national character; and every real lover of Freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means by which this necessary object may be best attained. And until it shall be accomplished, until the time shall come when we can point without a blush to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave."*

It is true that Taney was a slaveowner. But he manumitted most of his slaves while he was living in Frederick. He kept only those slaves who were too old and frail to support themselves. A kind and considerate slaveowner, he supported the old Negro friends by monthly allowances of cash until they died.

In 1815 Taney bought a brick house and slave quarters in Frederick. In 1823 he sold the property and made arrangements to move to Baltimore. In that city, he believed, there would be a wider field of professional opportunities.

There was a feeling of sadness when Taney left Frederick. His children had been born here. His mother and little son were buried here. Here he had been successful as a lawyer and had won political honors. Then, too, he had made many friends among lawyers and clients, at the old Frederick Academy, in St. John's Catholic Church, and generally among the citizens of Frederick County. However, at the age of 46 he answered the call of ambition.

As he had expected, Taney did enter a wider field of professional activity. In 1825 he appeared before the Supreme Court of the United States. In 1827 he

became Attorney General of Maryland. In 1831 President Andrew Jackson named him Attorney General of the United States. For a short time he was Acting Secretary of War. In 1833 the President appointed him Secretary of the Treasury. In January, 1835, Jackson nominated him for Associate Justice of the Supreme Court. This nomination was defeated by his political enemies; but in December, 1835, Jackson nominated him to take the place of John Marshall as Chief Justice of the United States. This appointment was confirmed on March 15, 1836.

DURING his service of 28 years as Chief Justice from 1836 to his death in October, 1864, Taney wrote about three hundred opinions for the Supreme Court and seven dissenting opinions. Before the decision in the Dred Scott case, his brilliant opinions had ranked him with John Marshall. It was pathetic that at 80 he was subjected to the vilest vituperations caused by the raging emotions over slavery.

The frenzied attacks upon the venerable Chief Justice seem especially tragic when we find out that Dred Scott was not particularly interested in being declared free from slavery, but scarcely knew what the litigation was all about, and that in reality the man he was suing, John F. A. Sanford, took him as a pawn in a fictitious sale for the purpose of getting a decision on the question whether a slave would become free on being taken into free territory.

Dred Scott was born in Virginia as a slave. He became the property of Dr. John Emerson, an army surgeon, in Missouri. In 1834 Dr. Emerson took him to a military post at Rock Island, Illinois, and then in 1836 to Fort Snelling, a post located along the Mississippi River in the Upper Louisiana territory north of the limit of slavery permitted by the Missouri Compromise.

At Fort Snelling Dr. Emerson purchased a slave named Harriet, who became Scott's wife. In 1838 Dr. Emerson returned to Missouri bringing along Scott and his wife and a daughter born to them. After they had returned to Missouri, another daughter was born to the Negro couple.

Following the death of Dr. Emerson, his widow hired Scott to a number of families who needed servants. In course of time Mrs. Emerson moved to Massachusetts, leaving Scott with a young lawyer and business man named Henry Blow, an active antislavery man.

Apparently Mrs. Emerson did not want Dred Scott as her slave, and Henry Blow, who had charge of Scott, apparently wanted Scott freed; for, according to Bruce Catton, the Civil War historian, Blow actually helped to finance the suit in the Missouri state courts to have Scott declared no longer a slave.

In the meantime, Mrs. Emerson married again. Her new husband was Calvin C. Chaffee, a radical antislavery congressman from Massachusetts. As Chaffee was annoyed by the thought that his wife was a slaveowner, she transferred Scott to her brother, John F. A. Sanford, who was a resident of the State of New York.

Arrangements were now made to have Dred Scott bring suit against Sanford in the Circuit Court of the United States for the District of Missouri. The suit was an action of trespass *vi et armis*. The declaration contained three counts: one that Sanford had assaulted the plaintiff; one that he had assaulted Harriet, his wife; and one that he had assaulted Eliza and Lizzie, the children. In order to meet jurisdictional requirements, Scott claimed three thousand dollars damages for each of the assaults. It is probable, however, that neither Scott nor any member of his family ever saw Sanford.

The Constitution of the United States provides that the Federal courts shall have the power to consider cases between citizens of different states. Sanford pleaded that the Supreme Court of Missouri had decided that Scott was a slave and not a citizen of Missouri, and therefore the Federal Court lacked jurisdiction of the case.

Scott's lawyers then brought the case to the United States Supreme Court. Arguments were heard in Washington in February, 1856; but the Justices were unable to reach an agreement. It was decided to have the case reargued after the Presidential campaign. The newly formed Republican Party, with John C. Fremont as candidate for President, demanded that slavery should not be allowed to expand.

In November, 1856, James Buchanan, of Pennsylvania, was elected President; and in December the inflammatory case was reargued. Chief Justice Taney was not in a hurry to hand down a decision. It was mid-February when he conferred with his colleagues. It was his original idea that the Court should decide the case entirely upon the Missouri Supreme Court's decision that Scott was not a citizen. He assigned the case to Justice Samuel Nelson of New York.

It was learned soon afterwards, however, that the two dissenters, Justice John McLean of Ohio and Justice Benjamin R. Curtis of Massachusetts, strong antislavery men, were intending to write dissenting opinions in which they would set forth in detail their views on the constitutionality of the Missouri Compromise. For that reason, Justice James M. Wayne of Georgia, who had previously favored taking a position on the Compromise, urged Taney to take the assignment back from Justice Nelson and write the opinion of the Court himself. If the two dissenters were going to set forth their views on the momentous issue of the extension of slavery, would it not be unfair for the majority to be silent on the issue?

There was great excitement throughout the Nation

Photo from Author's Collection

Supreme Court Chief Justice Charles E. Hughes at the unveiling of a bust of Taney in front of the Frederick County Court House in 1931. Justice and Mrs. Hughes are at left. Former Maryland Gov. Albert C. Ritchie is shown at right of the bust and Joseph D. Baker is at far right.

on March 4, 1857, the day Chief Justice Taney swore in Buchanan as President of the United States. The new President prophesied in his inaugural address that the issue of slavery in the territories would be settled peacefully. He promised that he would cheerfully subscribe to whatever the Supreme Court decided in the Dred Scott case.

On the following day Taney was busy completing his opinion. Then on March 6 he brought the long opinion to the Capitol; and when he read it on that day, his feeble voice was so low that there were many in the court room who were unable to catch his words.

THE first issue he considered was whether a Negro, whose ancestors had been imported into this country and sold as slaves, could be a citizen of a State within the meaning of the Constitution. He decided that the Signers of the Constitution did not intend Negroes to be included within the meaning of the word "citizens." On the contrary, he said, for more than a century Negroes had been regarded as so inferior that "they had no rights which the white man was bound to respect."

Of course, this ruling would have been sufficient to dispose of the case. But Taney proceeded to discuss whether Scott was free in Missouri by reason of residence in the territory of Upper Louisiana north of the slavery line in the Missouri Compromise. After a thorough discussion, he held that the provision in the Compromise excluding slavery violated the Due Process Clause of the Fifth Amendment.

Finally, Taney came to the issue whether Scott was made free by being taken into the State of Illinois, and, if so, whether he was again reduced to slavery by being brought back to Missouri. He said it was firmly settled by Missouri's highest Court that Scott and his family were not free upon their return to Missouri.

The Supreme Court therefore held that the Circuit Court had no jurisdiction in the case. Judgment for Sanford was reversed, and a mandate issued dismissing the suit for want of jurisdiction.

Taney's opinion covers 55 pages in the Supreme Court Reports. While the effect of the decision was to declare, by a vote of 7 to 2, that Dred Scott and his family were still slaves, every one of the Associate Justices read his own opinion. The opinions of the Associate Justices cover a total of 179 pages.

In retrospect, it is easy to condemn Taney for discussing the Missouri Compromise. But we should realize the complicated situation that confronted him. Five of the Justices came from Southern States. Only three felt that no Negro of slave ancestry could be a citizen. Five Southern Justices and Justice Grier felt that any legislation excluding slavery from a territory was void. Five Southern Justices and Justice Nelson felt that Scott's status as a slave was determined by the law of the State of Missouri.

However that may be, Taney was bitterly denounced by the abolitionists, and the decision fanned the flames of sectional hatred. It challenged the rising Republican Party to renewed struggle. The controversy could not be settled by judieial pronouncement. It was definitely settled by the Civil War. Taney's decision was superseded by the Thirteenth and Fourteenth Amendments to the Constitution.

Taney's mind was extraordinarily clear and brilliant up until the end of his service on the Court at the age of more than 87. In 1859, when nearly 82, he wrote one of his greatest opinions, the opinion in *Ableman vs. Booth*. In that case Booth had aided a fugitive slave to escape from the United States Marshal and was arrested for violating the Fugitive Slave Law. He was released by order of the Supreme Court of Wisconsin on the ground that the Fugitive Slave Law was unconstitutional. In reversing the action in Wisconsin Taney eloquently emphasized the duty of a State "to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union."

MANY years afterwards, Chief Justice Charles Evans Hughes called the opinion which Chief Justice Taney wrote in that case "the crown of the judicial career." It was at the unveiling of the bust of Taney in Frederick on September 26, 1931, that Chief Justice Hughes eulogized Taney for unflinchingly discharging the supreme duty of his office "in this eloquent and uncompromising utterance, upholding the authority of the Court at a time of extreme passion and agitation."

Up to this time Taney had administered the oath of office to six Presidents — Martin Van Buren, William Henry Harrison, James K. Polk, Zachary Taylor, Franklin Pierce, and James Buchanan. The seventh and last President he inducted into office was Lincoln on March 1, 1861. Secession and war followed. During the last four tragic years Taney was a pathetic figure, often shunned, despised, condemned.

In May, 1861, the Chief Justice, now over 84, was the target of further denunciation. A resident of Baltimore County, Md., John Merryman, had been arrested by soldiers and imprisoned at Fort McHenry. Taney ordered the issuance of a writ of habeas corpus commanding General George Cadwalader to produce Merryman before him in Baltimore. Neither the general nor the prisoner appeared in Court; and Taney, on leaving his daughter's home one morning, remarked that he himself might be imprisoned in Fort McHenry before night. Taney was now denounced for serving the cause of traitors. Greeley's *Tribune* cried out: "When treason stalks abroad in arms, let decrepit judges give place to men capable of detecting and crushing it."

The vilifications of Taney continued even after he was lowered into his grave in Frederick.

In the United States Senate, when it was suggested that a bust of the late Chief Justice be placed in the Supreme Court chamber, Senator Sumner, in opposing it, shouted that Taney was wicked and degraded, and that his name would be "hooted down the pages of history."

Some years thereafter, a similar prophecy was made by a distinguished Philadelphia lawyer and historian. In making his attack on the decision in the Dred Scott case, this critic accused Chief Justice Taney of being primarily to blame for "the infamy of that fatal blunder," and predicted that he would "carry the blood stain on his ermine to eternity."

But Maryland, holding Taney in high esteem, even in reverence, led the way toward a rectification of injuries inflicted upon Taney's reputation. In 1867 the Legislature of the State made an appropriation of five thousand dollars to provide for a monument in Taney's honor.

The statue of the great jurist was unveiled in front of the State House in Annapolis on December 10, 1872. Severn Teackle Wallis, the orator of the day, explained that the statue had been erected as a protest to the Senate's action in withholding Taney's bust from the place it deserved in the chamber of the Supreme Court.

Governor William Pinkney Whyte, in responding, said that the statue of Taney was Maryland's way of handing down to posterity "an enduring tribute of affection and regard for her own illustrious son, upon whose shoulders the judicial ermine lay stainless as the virgin snow."

As the years have gone by, the American people have come more and more to realize the sterling character, the great courage, the high motives, and the remarkable judicial ability displayed by Taney in times of dreadful emotion.

Chief Justice Hughes, in closing his address in Frederick in 1931, said: "With the passing of the years, and the softening of old asperities, the arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice."

Finally, on Oct. 24, 1954, Chief Justice Earl Warren, speaking at the dedication of the monument at Taney's grave, said: "In a manner of speaking, today's tribute helps redress an old wrong — helps erase the calumny which Taney's enemies had hurled at him during his lifetime and which superficial historians preserved as gospel truth for a time after his death. Few men in American life — and surely no Justice of the Supreme Court — have been so grossly misrepresented as Taney."

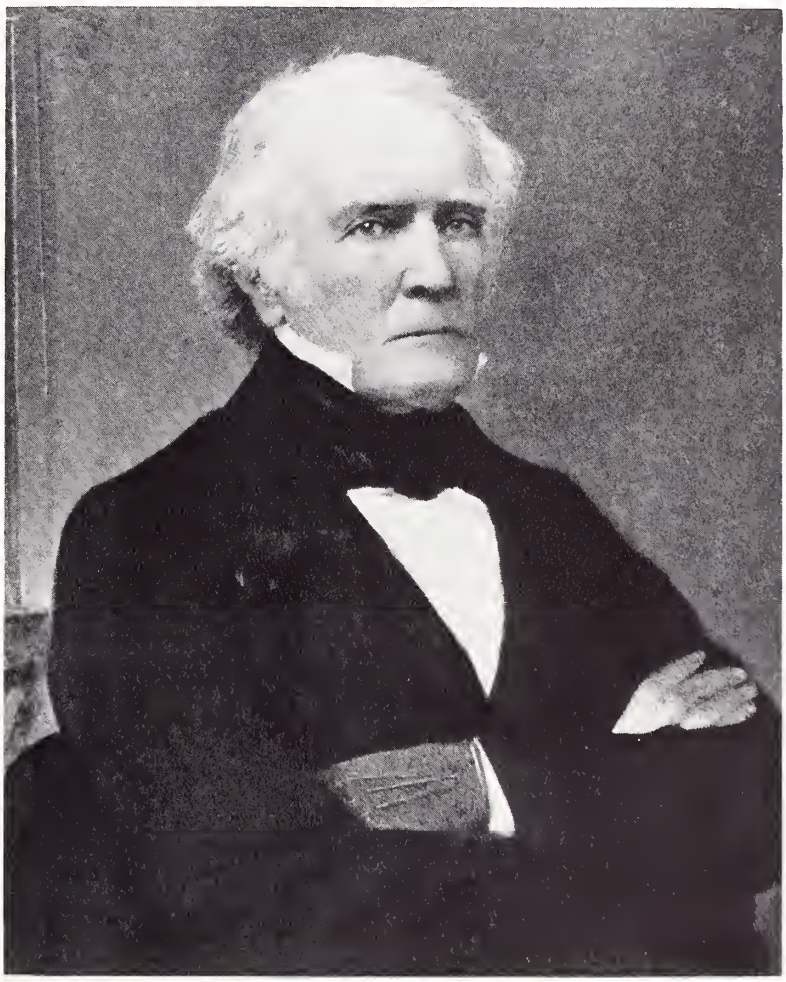
Lincoln Lore

July, 1975 | Bulletin of The Lincoln National Life Foundation...Mark E. Neely, Jr., Editor. Published each month by The Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801. | Number 1649

A Philadelphia Lawyer Defends the President

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This one sentence is the sole mention of the writ of *habeas corpus* in the United States Constitution. Before the Civil War, it had figured only rarely and briefly in the country's seventy-odd years of constitutional disputes and controversies. In 1807, President Thomas Jefferson became sufficiently alarmed over the Burr conspiracy to ask Congress to suspend the privilege of the writ for a period of time. Behind closed doors, the Senate passed a bill to suspend for three months, but the House rejected the bill by a large majority. Chief Justice John Marshall, in a case which also stemmed from the arrest of an alleged member of the Burr conspiracy, *Ex parte Bollman,* said "that if at any time the public safety should require the suspension of the power" to issue the writ, "it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide." Finally, one of the great commentators on the United States Constitution, Judge Joseph Story, said rather tentatively, "It would seem, as the power is given to *Congress* to suspend *the Writ* of Habeas Corpus in case of Rebellion or Invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body."

There was nothing in the history of the use and interpretation of the *habeas corpus* clause in the Constitution to prepare the country for President Abraham Lincoln's suspension of the privilege of the writ of *habeas corpus,* which occurred as early as April 27, 1861. The issue was brought to public attention by the case of one John Merryman, who lived near Baltimore and was arrested on suspicion of being the officer in charge of a pro-secession Maryland military unit, of being a party to destroying railroad tracks and bridges to prevent loyal troops from reaching Washington, and of obstructing the United States mails. The Chief Justice of the United States Supreme Court, Roger B. Taney, also sat as a circuit judge in the Maryland federal court, and he issued a writ of *habeas corpus.* The military officer who had arrested Merryman refused to present Merryman to the court on the grounds that the President had suspended the privilege of the writ. Taney then wrote an opinion—as a circuit judge, not as the Supreme Court's Chief Justice—which claimed that President Lincoln could not suspend the privilege because Congress, like Parliament in England, alone possessed that power. Lincoln and Attorney General Bates ignored the opinion.



From the Lincoln National Life Foundation

FIGURE 1. This portrait of Horace Binney, copied from a photograph, pictures him as he must have looked about the time he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution.* The portrait appears in Charles Chauncey Binney, *The Life of Horace Binney with Selections from His Letters* (Philadelphia: J.B. Lippincott, 1903).

Most of the authorities in print to that date and the Chief Justice of the Supreme Court thus argued that Lincoln could not do, constitutionally, what he had done. The President badly needed some legal opinion supporting his position. The Attorney General supplied one, but most authorities, then and ever since, agree that it was sloppily done and poorly argued. Joel Parker, Royall Professor of Law in the Harvard Law School, supported the President in an article for the prestigious *North American Review* entitled "Habeas Corpus and Martial Law." Parker, who would become a foe of the President after he issued the Emancipa-

tion Proclamation, argued broadly that in time of "paramount military obligation . . . the military law must be held to supercede the civil." Parker's argument was broader than it needed to be, for suspending the *habeas corpus* privilege subjects the party only to arbitrary arrest and confinement; it does not subject him to martial law and thus to trial by military tribunal rather than by jury in a civil court. President Lincoln was still in need of a persuasive defender who could sift the constitutional authorities and, in a rigorous way, supply a logical constitutional argument for the Executive's power to suspend the writ of *habeas corpus*.

1. A Conservative Admirer of Lincoln

The argument Lincoln needed came from an odd source, a conservative octogenarian lawyer from Philadelphia named Horace Binney, a man who had largely avoided political disputes for some thirty years. The President did not seek him out, but Francis Lieber, a German immigrant who became America's greatest early student of politics and probably her first professional political scientist, did. Lieber, who himself wrote many pamphlets encouraging loyalty during the Civil War, urged Binney to publish a pamphlet on the subject of the *habeas corpus*. Binney was interested in the question because he doubted the validity of the arguments he had seen, because he believed heartily in the Union cause, and because he was an admirer of President Lincoln.

Horace Binney was a rather unlikely Lincoln admirer. Born in 1780, he was a generation older than Lincoln. He attended Harvard College and graduated with high honors in 1797. He studied law with Jared Ingersoll in his home town, Philadelphia, and gained admittance to the Philadelphia bar in 1800. He served one term as a legislator elected on a fusion ticket of Federalists and Independent Democrats. Thereafter his law practice amidst the burgeoning commerce of Philadelphia became very lucrative. He became a director of the first United States Bank. In 1832, he ran successfully for Congress, this time as an anti-Jackson candidate (and with the understanding that he would not have to support Pennsylvania's pet interest, the protective tariff; that a vote for him should be considered only a vote against Andrew Jackson; and that he would not be bound to act with any party in Congress). There he became rather embittered against party politics; "the spirit of party," he said, "is a more deadly foe to free institutions than the spirit of despotism." He retired for the most part from active court work twenty-four years before the Civil War began, and, although he wrote several eulogies and an historical piece on the authorship of Washington's Farewell Address, he was little involved in political questions until the war broke out.

Binney disliked democracy, whether with a small or a large "d," and he opposed the provision of the Pennsylvania Constitution of 1838, which made the tenure of the state's judges a period of years rather than during good behavior. He was a rather crusty Federalist as long as that party existed. He always hated the Democratic party, but he had his reservations about the Whigs as well, especially insofar as their leaders, Henry Clay and Daniel Webster, practiced the political arts to gain the Presidency. Writing, appropriately enough, to Alexander Hamilton's son, J.C. Hamilton, in 1864, Binney accused Clay and Webster of caring "nothing about true fame" and of wanting "only . . . to get on the top of the pillar, like Simeon Stylites, to be looked at with upturned eyes by the people, and to be fanned with the *aura popularis* from all quarters of the heavens." He concluded:

> These aspirations for the President's office are to me a wonder and an astonishment, and I sometimes think that the most decisive argument against a republic is that it fools and dwarfs the best minds in the country, by directing their hearts towards the vain, ephemeral show of the first office in it, to be obtained by popular arts and intrigues; and the saving feature of a monarchy is its permanent, though personally insignificant, head, which compels men of great minds from thinking of the pinnacle, and drives them to work for their own fame in the elevation and consolidation of their country. . . .

Thus Binney was a true old Federalist who never quite adjusted himself to the age of the common man which flowered with Jacksonian democracy. His biographer, Charles Chauncey Binney, noted perceptively that it was Binney's dislike of democracy that made him the enemy of the Democrats without really being the friend of the Whigs.

> Mr. Binney's opposition to the Democratic party was due to its having made democracy its fundamental principle from the start, but he was well aware that after the passing of Federalism, the democratic spirit affected all political parties. Writing about 1840, he said, "The Whigs are at this day more democratic in their devices and principles than the Democrats were in the days of Jefferson. There are few or no sacrifices of constitutional principle that the Whigs will not make to gain power, as readily as the Democrats. . . . they have entered into full partnership with those who trade upon the principle that the people are all in all, that their voice is *vox Dei,* that the masses are always right, and that nothing else is fundamental in government but this. What the Whig affix means, I think it is difficult to say. . . . The only question is how to obtain most of the sweet voices and emoluments of government, and this is as much a Whig object as a Democrat object, and there is no obvious or characteristic difference in the nature of their respective bids."

Binney explained his political philosophy, as opposed to his party principles, to his British friend J.T. Coleridge in 1863, "I have a horror of democracy as the radical principle of a government, . . . while I am as firm a friend of free government as any man that lives." He reconciled the two seemingly divergent beliefs by invoking the age-old idea that representatives were responsible to God, though chosen by the people:

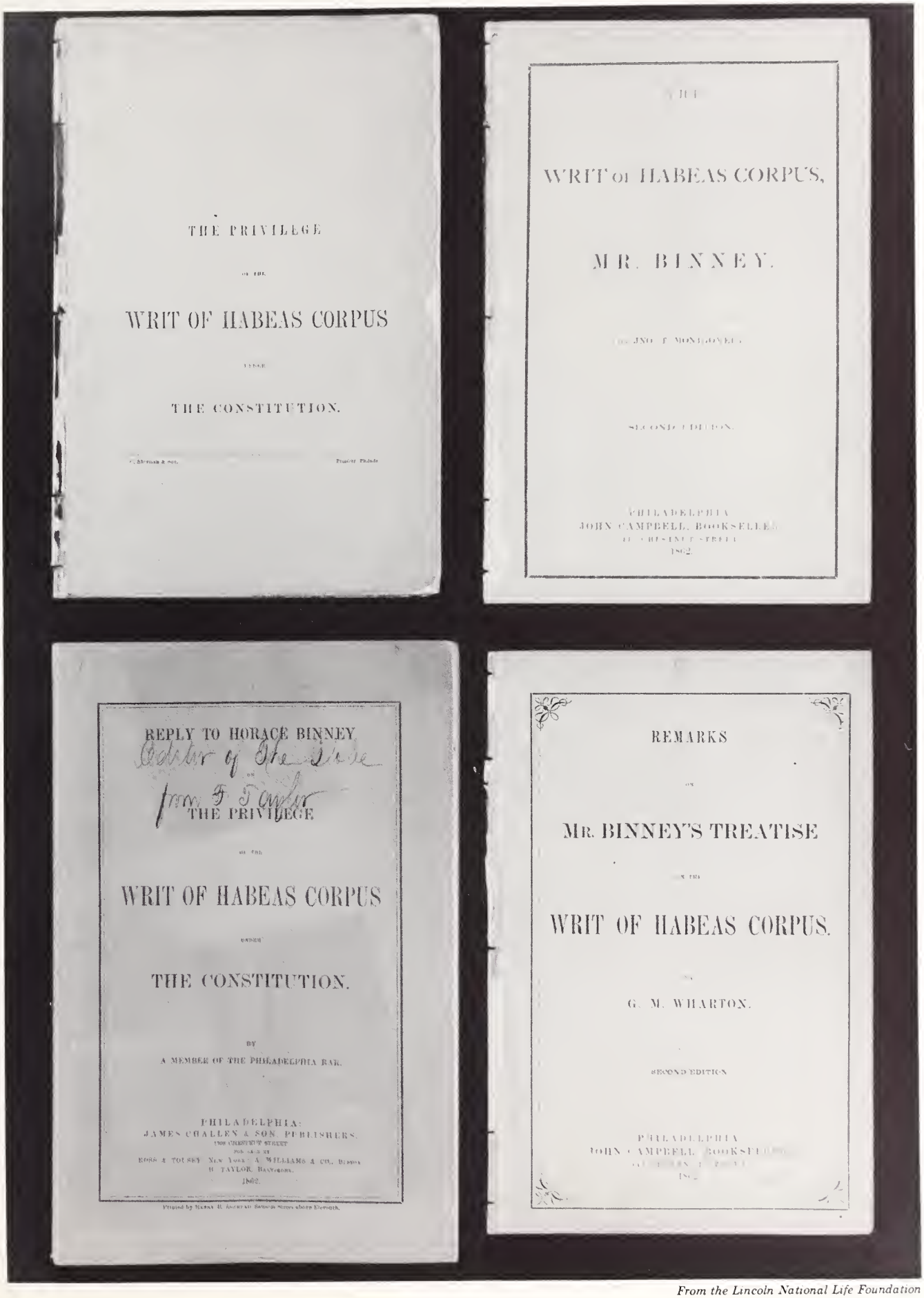
> That the people are the final cause and the Constitutional origin of all power among us is true. . . . But the moral source of all power, which is also the source of the people, has respect to the ends and purposes, the sure establishment of freedom as well as its diffusion, [and] the people as people are not the true source of it, but God above, and the moral qualities with which His grace imbues some and not all men. Virtue, reason, love for mankind, which come from the eternal source of all power, have better right to exercise it than man simply.... His moral qualities are his true title; and therefore, while I admit him to be the final cause of political power with us, I do not admit him to be the efficient cause of power in government.

He recognized equality of opportunity for political distinction but not equality of capacity and therefore required "siftings, distinctions, and qualifications, in all preparations for the exercise of political power. . . ."

Despite the dominant anti-democratic theme in his long life, Binney found much to admire in the railsplitter whose skillful practice of the political arts brought him to the Presidency in 1861. He apparently knew little or nothing about Lincoln before he assumed the office, and he therefore judged the President by his acts. Binney liked what he saw. In March of 1861, he discussed Lincoln's Inaugural Address with Coleridge:

> . . . I hope you will agree with me that it is a plain, sensible paper, expressing right doctrines as to the perpetuity of the Constitution, the unlawfulness of *secession,* and the duty of enforcing the laws; and in a kind temper, tho' with all requi-

FIGURE 2 (facing page 2). Horace Binney's pamphlet appears in the upper left hand corner. Judge S.S. Nicholas of Louisville, J.C. Bullitt* of Philadelphia, George M. Wharton* of Philadelphia (in two pamphlets), Tatlow Jackson,* Edward Ingersoll of Philadelphia, John T. Montgomery* of Philadelphia, C.T. Gross, William M. Kennedy, Isaac Myers,* and James F. Johnson* answered it. Sydney George Fisher's "Suspension of Habeas Corpus During the War of the Rebellion" identifies the author of the pamphlet shown in the lower left-hand corner as David Boyer Brown; previous owners have identified it on the cover as Frank Taylor's pamphlet. Wharton's and Montgomery's answers are also pictured. Asterisks (*) indicate pamphlets in the Lincoln National Life Foundation collection.



THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

THE

WRIT OF HABEAS CORPUS,

MR. BINNEY.

SECOND EDITION.

PHILADELPHIA
JOHN CAMPBELL, BOOKSELLER
1862.

REPLY TO HORACE BINNEY

ON

THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

BY

A MEMBER OF THE PHILADELPHIA BAR.

PHILADELPHIA:
JAMES CHALLEN & SON, PUBLISHERS,
1308 CHESTNUT STREET.
FOR SALE BY
ROSS & TOUSEY, New York; A. WILLIAMS & CO., Boston;
H. TAYLOR, Baltimore.
1862.

REMARKS

ON

MR. BINNEY'S TREATISE

ON THE

WRIT OF HABEAS CORPUS.

BY

G. M. WHARTON.

SECOND EDITION.

PHILADELPHIA
JOHN CAMPBELL, BOOKSELLER
1862.

From the Lincoln National Life Foundation

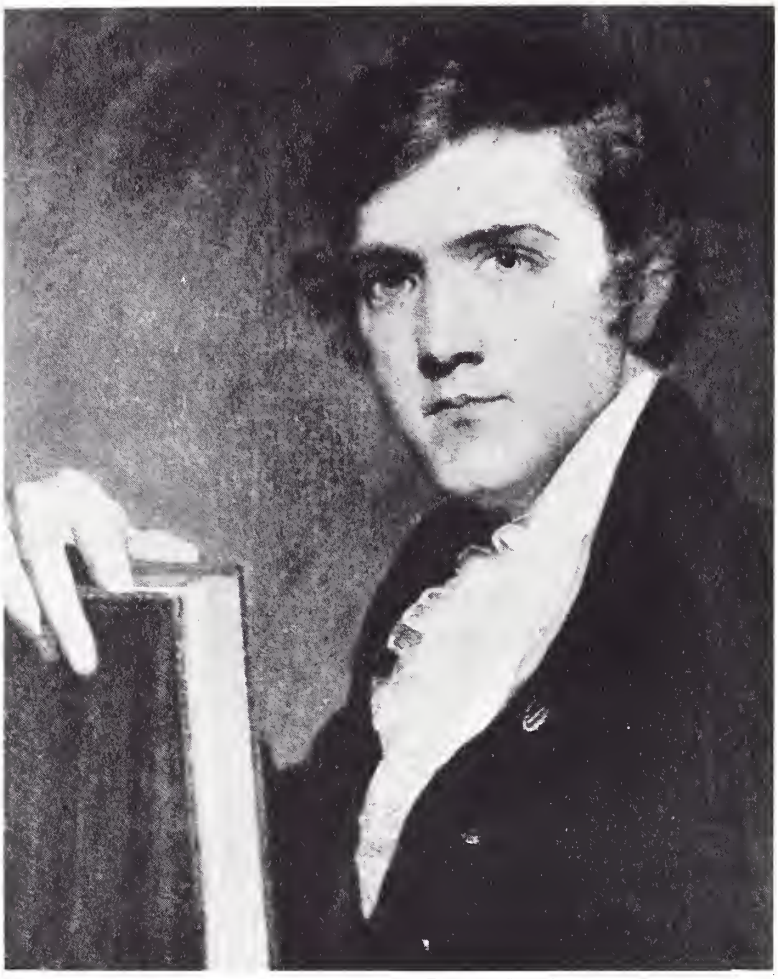
site firmness, declaring his purpose to administer his office with fidelity, and with effect as far as the country shall supply the means. I should think, and this is the common opinion, that the paper has been written by himself; and that it is a proof of a plain, sound mind, free from any disposition to press what he thinks right with much rigour, or what he thinks wrong or plainly expedient, from mere fidelity to party; the best temper, perhaps, for our country. His reasoning upon disputed points, where I have examined it with attention, appears to be accurate, and his heart kind. He is generally regarded as a cordial man, not highly educated, but of good reasoning powers, and both calm and brave. On the whole, I like his début. The *people* will understand him; and that is a great point with us.

Nine months later, Binney was still describing the President in radiant hues for his English correspondent, though with the customary reservations about Lincoln's physical appearance.

The character of this President has come to be received by nearly all among us (the free North and West) as very frank, unaffected, and honest. I recollect no President, who was so little known when he came into office, who so soon, and in times of vast difficulty and very general self-seeking, as well as of great devotion to public service, has acquired a very full confidence of the people for these qualities. He seems to be an entirely sincere and honest man. He does not appear to think much of himself, but is disposed to give all he has, and is, to the country; and to shew himself always in his own clothes. Perhaps he might get handsomer; but we have been so much annoyed by pretensions in some of our Presidents, that we are not sorry to see a little more of the undress or natural style.

In March of 1862, after the Trent Affair, Binney favorably explained the President's role to Coleridge, who was naturally interested in the strained relations between the United States and Great Britain.

We feel, I think, more kindly towards England since the settlement of the Trent affair; and perhaps Mr. Seward—I ought to say the President, for he is not thought to be a cipher in such matters—did well in not announcing too promptly his purpose or inclination to the people. He gains daily upon all of us, in the great attributes of integrity, a love of justice, clear good sense, untiring industry, and patriotism. He also is thought to know the people, which is a great matter, as he came in without the reputation of being able to lead them by command.



From the Lincoln National Life Foundation

FIGURE 3. Proof that Horace Binney's career bridged two widely separated eras lies in comparing this portrait with the one on the cover. This portrait was painted by Gilbert Stuart in 1800. When the painter was told that he had put the buttons on Binney's coat on the wrong lapel, he said, "Have I? Well, thank God! I am no tailor." Then he changed the coat to a double-breasted model. The color (which is claret) Stuart made up because it went well with Binney's complexion; Binney never owned a coat that color. A reproduction of the portrait appears in Charles Chauncey Binney's *Life of Horace Binney*.

2. *The Privilege of the Writ of Habeas Corpus under the Constitution*

Fortunately for President Lincoln, Horace Binney was at his lawyerly best when, in the autumn of 1861, he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. This is not to say merely that the Philadelphia lawyer's argument was ingenious, though many constitutional students at the time and ever since have recognized it as such, but that he eschewed unnecessary *dicta* which might have sat poorly with his jury. The jury which judged Lincoln was the American people, and they would not have taken kindly to Binney's old Federalist beliefs, to his uneasiness with democracy, and to his desire for government by those who had been sifted from the common herd by educational distinctions and conservative moral qualifications.

Lincoln's prosecutors, the Democratic politicians, would have had a field day had the ancient Philadelphia lawyer voiced the sentiments in the pamphlet which he voiced in his private letters to Alexander Hamilton's son and to skeptical British conservatives. The Democrats were having trouble distinguishing themselves from the Republicans anyway. They supported the war for the Union as much as the Republicans did, and Lincoln had not yet provided them with an issue by turning it into a war for the freedom of the Negro. Their traditional appeals to the economically disaffected had little appeal in the midst of war-induced economic prosperity. All that was left to them was the issue of civil liberties, and this would have been powerful indeed had the President's defenders justified the suspension of the privilege of the writ of *habeas corpus* as suitable discipline for an unruly democracy. As it was, Democrats would attack the suspension and Binney's defense of it time and time again, but the nature of his argument often confined them to narrow constitutional grounds and denied them any *ad hominem* argument that only crusty old Federalists supported such things in the tradition of the Alien and Sedition Acts of John Adams.

Binney's argument was strictly, which is not to say narrowly, constitutional. There was little or nothing of political philosophy in it. He merely tested the suspension of the privilege of the writ of *habeas corpus* by the various forms of constitutional argument used in his day. *(Continued in next issue)*

Lincoln Lore

August, 1975 Bulletin of The Lincoln National Life Foundation...Mark E. Neely, Jr., Editor. Published each month by The Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801. Number 1650

A Philadelphia Lawyer Defends the President (Cont.)

First, he addressed the language of the Constitution itself. Here, and here alone, Binney had to use "the broad constitutional and natural argument" rather than "the merely legal and artificial." The narrow legal argument would say that the clause in the Constitution does not say explicitly who can suspend, but "suspend" means by customary English usage—and it is from English law that ours derives—passing a law to countervail the writ which is instituted by law. Only Congress can make law, and thus Lincoln had no power to suspend the writ. Binney argued that such reasoning did not apply in this case because there is a peculiar American science of politics stemming from the fact that the Constitution is superior to all political power and itself makes things legal which Congress, unlike the British Parliament, cannot make legal or illegal. "Suspending the *privilege* of the Writ," he argued, "is not an English law expression. It was first introduced into the Constitution of the United States." The true reading, therefore, was this:

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FIGURE 1. In this detail from a ghoulish anti-Lincoln cartoon, President Lincoln, Secretary of the Treasury Salmon P. Chase, and Secretary of the Navy Gideon Welles watch as Horace Greeley and Senator Charles Sumner lower a coffin labeled "CONSTITUTION" into a grave. Other coffins are labeled "FREE SPEECH & FREE PRESS," "HABEAS CORPUS," and "UNION." The cartoon is entitled "The Grave of the Union. Or Major Jack Downing's Dream, Drawn By Zeke." It was published in 1864 by Bromley and Company in New York City. The cartoons were available at 25¢ per copy, five for a dollar, fifty for nine dollars, and one hundred for sixteen dollars. Although the constitutional argument as outlined by Horace Binney, Roger B. Taney, and Attorney General Edward Bates was dry and complex, the issue of suspending the privilege of the writ was a popular issue exploited by the Democrats in cartoons and campaign literature.

> The Constitution of the United States *authorizes* this [suspension of the privilege] to be done, under the conditions that there be rebellion or invasion at the time, and that the public safety requires it. The Constitution does not *authorize* any department of the government to *authorize* it. The Constitution itself authorizes it. By whom it is to be *done*, that is to say, by what department of the government this privilege is to be denied or deferred for a season under the conditions stated, the Constitution does not expressly say; and that is the question of the day.

To answer "the question of the day" was now easy. All Binney had to do was to determine which department of the government customarily exercised power over the sorts of questions mentioned in the *habeas corpus* clause. The executive is clearly the power which must cope with rebellion and invasion and declare when the public safety has been endangered by them. As a result of the Whiskey Rebellion of 1794 (Binney called it the Western Insurrection), a law of 1795 clearly enacted "that when the United States shall be invaded or be in imminent danger of invasion" and "whenever the laws of the United States shall be opposed, or the execution thereof be obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by this Act, it shall be lawful for the President of the United States to call forth the militia of such State, or of any other State or States, *as may be necessary to suppress* such combinations, and to cause the laws to be duly executed." A Supreme Court decision, *Van Martin* v. *Mott* laid it down that the President's judgment was conclusive; he could decide the point at which there was rebellion. In fact, President Lincoln called forth the militia in 1861 by authority of that 1795 act.

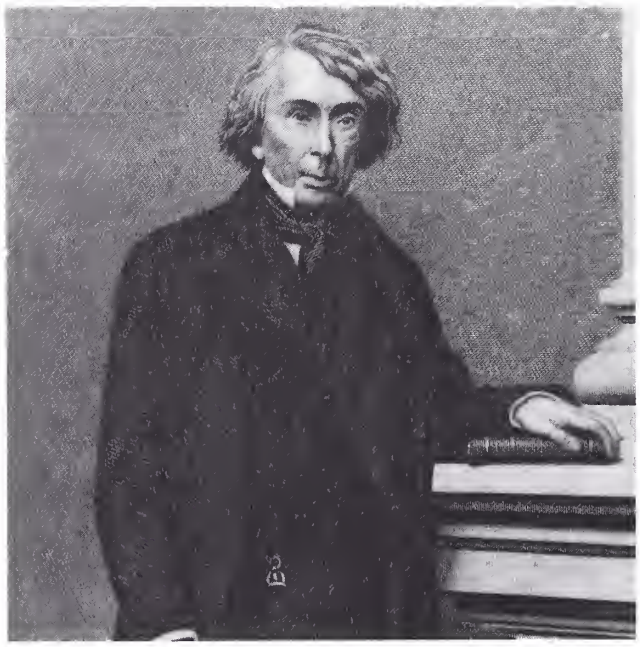
The second and most important aspect of Binney's argument was its rejection of the applicability of British example by analogy. Sydney George Fisher wrote what remains the outstanding treatment of the subject of "The Suspension of Habeas Corpus During the War of the Rebellion" for the *Political Science Quarterly* as long ago as 1888, and his summary of Binney's case in this regard merits quotation at length:

> It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. . . . Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.
>
> There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. . . . But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and there was nothing in those powers to excite alarm.

Having explicated the language in the Constitution itself and having disposed of the argument by analogy with English precedent, Binney then proceeded to examine the intent of the framers of the Constitution, insofar as there was evidence in their writings or in the records of the secret Constitutional Convention of 1787. Charles Pinckney of South Carolina originally contemplated a suspension by Congress only in times of invasion or rebellion. Later, he suggested suspension by Congress on vaguer grounds ("upon the most urgent and pressing occasions") and for a limited time period stated in the Constitution itself. Gouverneur Morris of New York suggested the final language a few days later. According to Binney, the convention rejected Pinckney's English view (suspension by the legislature when it deemed it necessary) for a uniquely American view. Originally, the clause was placed in the article pertaining to the judiciary, but the committee on style placed it in the first article because that section was restrictive throughout, not because most of the section places restraints on Congress.

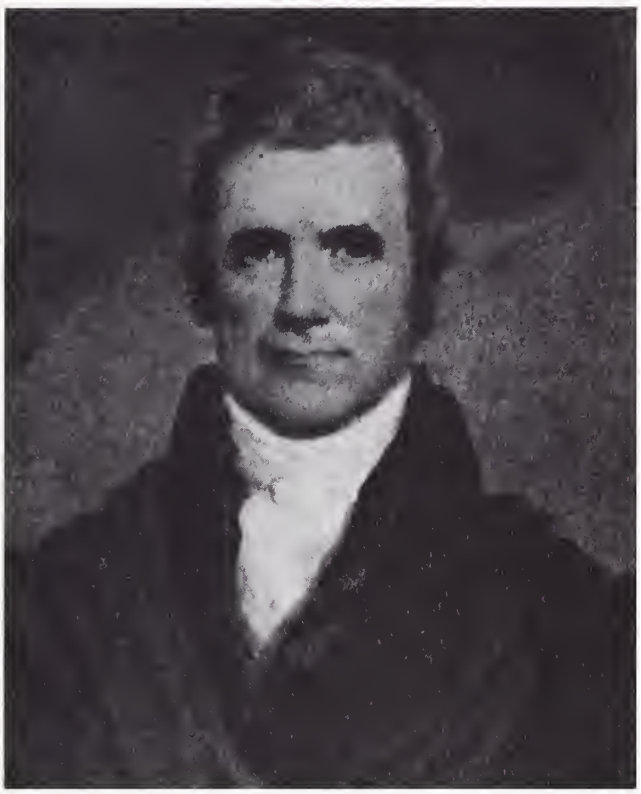
Binney then addressed the rather meagre judicial history of the clause. Taney's recent decision in the Merryman case had no authority because it did not come from the Supreme Court but from a circuit court. John Marshall's language in *Ex parte Bollman* had no bearing on the case, because there was no invasion or rebellion at the time, and neither President nor Congress had suspended. It was strictly an *obiter dictum*, not bearing on the nature of the case he had before him. Finally, Joseph Story's opinion was of little weight because it was the opinion of a *commentator* and not of a judge actually deciding a case or precedent.

Binney wrote before the era of the "sociological brief," and he did not address the question whether, in the abstract, it was better for the American people that Congress or the President have the power of suspension. He eschewed the argument from utility and confined himself to the customary lawyerly grounds for deciding a constitutional case: the language of the Constitution itself, the argument by analogy with English experience, the intent of the framers of the Constitution, the precedents in previous judicial decisions, and the opinions of learned commentators on the American Constitution. His argument was a dazzling courtroom-style performance, tightly woven on strictly constitutional and legal grounds. It astonished everybody, for, as Sydney George Fisher said



From the Lincoln National Life Foundation

FIGURE 2. Roger B. Taney



From the Lincoln National Life Foundation

FIGURE 3. John Marshall

twenty-seven years later, Americans "had supposed that the question was a settled one," and "up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend." Though it prompted many outraged replies, Binney's argument also convinced a goodly number of authorities on the Constitution. Our view of Lincoln's construction of the powers of the Presidency would be much different today had this capable Philadelphia lawyer not taken time in his eighty-first year to defend the President.

3. Horace Binney and Slavery, an Epilogue

Charles Chauncey Binney carefully points out in his excellent *Life of Horace Binney* that the famed Philadelphia pamphleteer "by no means approved every act of the administration during the war, but he held that at such a time loyal men should refrain from all public criticism. He had his own opinions and he expressed them in private, but during the whole war no word fell from him which could have added the smallest feather's weight to the burden of those who were charged with the weighty task of government." By the autumn of 1862, Binney began to find fault, privately, with some of Lincoln's policies.

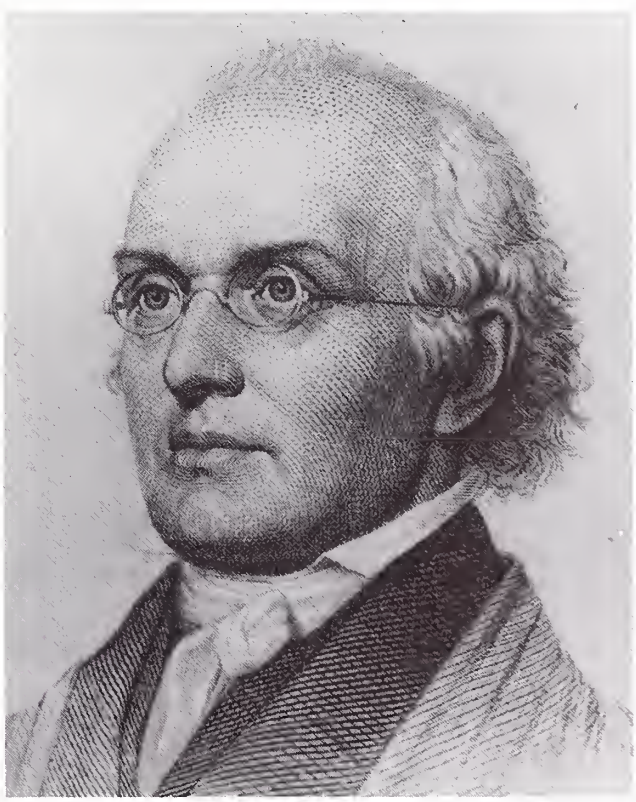
The first sign of misgiving came in an area one would deem surprising if one took Federalism to mean a form of undiluted conservatism. On August 5, 1862, almost two months before the issuance of the Preliminary Emancipation Proclamation, Binney wrote Francis Lieber a long letter about slavery, part of the contents of which follows:

> I have been much struck by the pointed and decisive answer the North is now giving to the pretence of the ambitious bad men of the South, who have poisoned their country with the belief that the North meant to uproot the institution of slavery, and therefore that it was impossible to avoid making war against us. The absence of any such Northern feeling generally, or even to a dangerous extent, is now the cause of our most dangerous and weakening divisions. Even in the midst of a war which is entirely defensive, and in the presence of imminent danger, it is the great impediment to the use of even military power to weaken the South by interfering in any way with their slaves.
>
> God knows I disapprove of the institution of slavery every way,—for its effect upon the slaves, still more for its effect upon the masters, most of all for its incompatibility, growing and incurable incompatibility, with such a government, black slavery pre-eminently. . . . I do not wish to be quoted to the President, or any of the Departments, or to anybody; but while I am not and never have been an abolitionist, in the imputed sense, I have no idea of protecting the slaves of the South in such a war, or of letting them interfere with the full use of our military means, with them or against them, to subdue the enemy. Unless this result is reached and the slaves are made to be *adstricti* [confined] to their own States, I do not see how we are to live hereafter, either united or divided.

Thus this Philadelphia conservative arrived at the position which urged some form of tampering with slave property out of military necessity before President Lincoln felt he could touch the South's peculiar institution.

When Lincoln did attack slavery, Binney expressed his first note of dismay with the President's policies. Binney's reasons were ones of constitutionality, and, by and large, he thought the President should have gone farther. Thus he wrote J.C. Hamilton on October 8, 1862:

> . . . the plans which have been adopted in the application in our immense force and resources I have sometimes disapproved when I thought I understood them, and much more frequently I have not understood them when our rulers have explained them. I go for the support of the government, as *per se* my duty, until mere obstruction shall be obviously better than what government is proposing to do; and that condition is not likely to occur. I say this in special reference to the President's Emancipation Proclamation, which is now the uppermost thing in the country. I do not understand the law of it. And do not believe there is any law for it, unless it be the law of force in war; and if it relies on that (which the Proclamation does not say, as I read it) it would, I think, have been much less disturbing to the country, and even more effectual, to have said it by way of conslusion



From the Dictionary of American Portraits, *Dover Publications, Inc., 1967*

FIGURE 4. Joseph Story

than of premises. . . . I still think the President is sincere and honest; but does the confidence of even his friends increase in his general competency?

In December, he wrote Lieber again. Binney had just read George Livermore's *Historical Research,* which the President was also reading or about to read (see *Lincoln Lore,* Number 1621). "I have travelled alongside of the muse of this history for more than sixty years," wrote Binney, "and all is written in my memory as Mr. Livermore records." He also asked Lieber what he thought of the President's recent Message to Congress. For his own part, he thought it

like his other messages, honest, sincere, and frank; and some of its *short* logic is good enough, but he does not excel, I think, in *long* logic, and I remain quite at a loss to reconcile his proclamation with his *projet* of emancipation, except by supposing that the emancipation shall apply only to those slave States which shall be represented in Congress on the 1st Jany., and to whom the proclamation seems to promise that they shall keep their slaves in slavery as they now are! I shall be glad, however, if he gets through the matter in any way, zigzag or otherwise. There is, I fear, no straight line of passage through it but force, if this people would consent to it.

By January of 1865, Binney had, despite his constant conservatism in the matter of democracy, moved along with the times (or rather ahead of them) sufficiently to write Lieber the following remarkable letter:

As to the universal suffrage of free blacks, my judgment is suspended. I have no repugnance to it. Fifty years ago, as a judge of election, I ruled that a free black native of Pennsylvania, who had paid his tax, was entitled to vote; and there was no dissent. Our Democrats, to accommodate the South, changed our [Pennsylvania] Constitution in 1838 (amended it, they said) by confining the elections to white freemen. But I have always questioned, and almost repudiated, the quietism of the Federal Constitution in turning over to the States the qualification for representatives in Congress.

Since 1903, Horace Binney has been remembered only for his pamphlet on the *habeas corpus.* Almost nothing exists in print on this remarkable man. To know him only by his pamphlet is to dismiss him as a facile conservative who was also an artful pleader of special causes. But we know today that the Federalist party, after the disappearance of which Binney never found a comfortable political home, comprehended an interesting variety of opinions. Some Federalists became politically adaptable in the declining years of their party; this was not, apparently, the case with Binney, who could never really get the hang of party politics. Some Federalists held attitudes towards slavery which were closely akin to those of later Republicans but were held back from any moral crusade by their being accustomed to an orderly hierarchical society which condemned political passion and individual self-assertion as the ultimate political sins. Binney was more at home with the America of 1861-1865 than of 1828-1856, and not merely because he could convert the Civil War to the cause of defending the authority of the national state, but because the times more nearly fit his moralistic vision of a political order. Parties were not gloried in in the 1860's, and slavery was clearly on the way out.

4. Conclusion

Binney receives honorable mention in several notable books. James G. Randall's *Constitutional Problems Under Lincoln* showed considerable respect for Binney's pamphlet. Without expressing a strong opinion as to its merits, Randall did fault Binney for his wish that the language of the Constitution had been more precise in regard to the *habeas corpus.* Writing in the age of "legal realism," Randall rather admired constitutional vagueness for the flexibility it allowed. In this respect, Randall's successor as a student of constitutional problems under Lincoln, Professor Harold Hyman of Rice University, is very much like his predecessor. Quoting a letter from Binney to Lieber with which one edition of *The Privilege of the Writ of Habeas Corpus under the Constitution* was prefaced, Hyman notes with approval that Binney thought the question "a political rather than a legal question,—a mixed political and a legal question. . . . No one should be dogmatical, or very confident, in such a matter," Hyman sounds like Randall when he adds, "At least Binney's frank inconclusiveness hit closer to constitutional realities than Taney's negative certainty or Bates's responsive geometry."

In truth, Hyman's remark and Randall's point of view both fail to capture the spirit of Binney's enterprise. After reading an answer to his pamphlet written by Judge S.S. Nicholas of Kentucky, Binney complained to Lieber:

What is the use of logic? Would you believe that for all my pains I get an answer from Judge Nicholas, which amounts to this and no more: If Congress, without the Habeas Corpus clause had taken away or not given the Habeas Corpus, how could the judiciary have helped it? God save the poor man who wastes lamp-oil on such heads! He does not perceive that this reduces it to a question of force. If the President will imprison without law, how is Congress to help it?

"What is the use of *logic?*" he said. Binney demolished Taney with constitutional logic, that is, with the traditional tools of the constitutional lawyer. For Binney, the life of the law was logic and not experience (to turn Holmes's famous saying on its head). He was vitally interested in what the Constitution actually said, whether American law was like English law, what the framers said, and what other judges said. Even the words of someone no farther removed than an accepted commentator (Story) were suspect. There was little or nothing of legal realism in this; this was a logic-chopper's work. He published no enthusiastic defense of the Emancipation Proclamation, probably for the reason that he could "not understand the law of it." Binney in no way challenged the accepted platitudes of mid-century constitutional jurisprudence. He was no less wedded to the separation of powers, say, than Edward Bates was; he simply located the ability to suspend the privilege of the writ of *habeas corpus* in that power which by long legal precedent could recognize a state of rebellion. If anything, his argument was a detriment to the advent of "legal realism," for Binney stressed a peculiarly American constitutionalism unlike that of Britain's ever-changing unwritten constitution and dashed Taney's analogy to English Parliamenttary practice to pieces.

George Fredrickson's *Inner Civil War* seems off the mark as well in its casual dismissal of Binney as a reactionary old fogey. "For Binney," says Fredrickson, "as for [Wendell] Phillips, the time of the Alien and Sedition Acts had returned, but for Binney it was an occasion for rejoicing." Binney's argument was not, apparently, opportunistic. The President had other defenders, his Attorney General and Joel Parker, for example; Binney entered the fray simply because he thought their manner of defense was wrong. He wanted to make a correct constitutional point. Nor did he rejoice uncritically in the opportunity war afforded authoritarianism. He disliked Nicholas's argument because it reduced law to mere force, and, more importantly, as his biographer points out, Binney had his differences with the Executive. Some of these were on the score that Lincoln took too authoritarian ground.

. . . it should be noted [says Charles Chauncey Binney] that he strongly disapproved of so much of the President's proclamation of September 24, 1862, as extended martial law and suspension of the Habeas Corpus to military arrests for discouraging enlistments, or for other disloyal, but not legally treasonable, acts. This proclamation went far beyond anything that Mr. Binney's pamphlets had justified, but he refrained from any public expression of his views, as he thought it the duty of loyal citizens not to hamper the administration by protests, although it might make mistakes or even exceed its legal power.

President Lincoln was indeed fortunate in having Horace Binney as his unsolicited defender. Binney himself has not been as fortunate in finding students with a sympathetic understanding of his constitutional world.

Bicentennial of Roger Brooke Taney—Part 3

Lincoln attends Taney's funeral in Washington

By JUDGE EDWARD S. DELAPLAINE

For several years Chief Justice Taney's death had been awaited impatiently by many politicians in the National Capital. During the year 1864 Taney had been able to serve only a few days on the bench, and members of Lincoln's Cabinet were hopeful that he would die soon to enable the President to appoint a successor.

Accordingly the announcement of Taney's death was a signal to many high officials for rejoicing. Immediately the announcement set in motion the machinery to produce the first Republican Chief Justice of the United States. Early in the morning after Taney's death — October 13 at 7:13 a.m. — Secretary of War Edwin M. Stanton sent a telegram to Salmon P. Chase announcing: "Chief Justice Taney died last night."

There was one Cabinet member, however, who had acquired great respect for Taney despite the fact that the old Chief Justice had been at odds with Lincoln's administration. It was the Attorney General of the United States, Edward Bates, whose duties had brought him in contact with the Supreme Court.

Although Mr. Bates's views differed sharply from Taney's, yet on the day after Taney's death he made this comment: "He was a man of great and varied talents; a model of a presiding officer; and the last specimen within my knowledge of a graceful and polished old gentleman." Then and there he made the prediction that, while Taney's reputation had been "dimmed by the bitterness of party feeling arising out of his unfortunate judgment in the Dred Scott case," in time his fame would be properly restored.

When Taney was on his death bed he told his daughters that he wanted his funeral to be conducted quietly without any public display. How well he knew the deep feeling of hostility that existed against him in the Capital City! He wanted no public ceremony. It would be inappropriate. His wish was followed. There was no thought of having his body taken into the Capitol to lie in state in the chamber of the Supreme Court.

The funeral arrangements were supervised by Ward Hill Lamon, Marshal of the District of Columbia. Lamon had been Lincoln's law partner in the town of Danville. Early in 1861 the President-elect said to him: "Hill, it looks as if we might have war. I want you with me. I must have you." So Lamon came to Washington with his banjo and his bulldog courage. Lincoln appointed him Marshal of the District of Columbia in April, 1861.

The selection of Lamon, Lincoln's friend and bodyguard, to make the funeral arrangements was gratifying. He was provided a special train on the Baltimore & Ohio Railroad to take the body and relatives and friends of the deceased to Frederick. Lamon knew personally John W. Garrett, president of the railroad company, both of them having accompanied Lincoln on the trip to Harper's Ferry, Antietam and Frederick in 1862. By direction of Mr.

President Lincoln

Garrett, the special train of two coaches was supplied by the B & O's master of transportation.

Arrangements were made to hold a brief funeral service in the Taney residence on Indiana Avenue on Saturday morning, October 15 at 7 o'clock. The special train would then depart from Washington's B & O depot in time to arrive in Frederick by noon.

On October 14 President Lincoln asked the members of his Cabinet whether they planned to attend the funeral of the Chief Justice. The Secretary of State, William H. Seward, was quick to answer. His views had long been known not only in opposition to slavery but also as to his hatred of Taney personally. In the Senate in March, 1858, he denounced the Dred Scott decision as the product of a conspiracy; and in October, 1858, in his famous speech in Rochester, he declared that the slavery struggle was "an irrepressible conflict," the outcome of which would make the United States either all free or all slave. So deeply had Taney been wounded by Seward's personal attacks that he swore several years later that if Seward had been elected President he would have refused to swear him into office.

Nevertheless, in the White House the day before Taney's funeral, Seward said he felt that it was his duty to attend the service in Taney's home as a mark of respect. He also advised the President that he thought that he, too, ought to attend. However, Seward stated that he had no intention of going to Frederick to attend the church service there.

Attorney General Bates, who had often differed with Seward in the Cabinet, said that he felt that it was his duty to attend not only the service in the home but also the service in the church in Frederick.

Edwin M. Stanton, the irascible Secretary of War, who strongly favored abolition of slavery, was positive in his decision that he would not attend either of the services.

Lincoln, slow and deliberate as usual, turning to the Secretary of the Navy, Gideon Welles, inquired what he thought would be the proper thing to do. Mr. Welles, who had left the Democratic party because of his views on the slavery question and had helped to organize the Republican party in New England, said that, like Mr. Stanton, he had no desire to attend any part of the funeral. He acknowledged that it would be courteous for the President as well as the Secretary of State and the Attorney General to attend the funeral as a token of respect, but he said that in his opinion "it would be best not to take any official action, but to let each member of the Cabinet act according to his desire."

Mr. Welles's opinion seemed to be sensible. Abe said that he figured on going to the service at the house in the morning; but as he had plenty of jobs to handle at the White House he didn't figure on going to Frederick.

For the portfolio of Secretary of the Treasury, Lincoln had appointed William P. Fessenden to succeed Salmon P. Chase after his resignation in June. Mr. Fessenden definitely stated that he would not attend any part of the funeral. Faced, as he was, with a nearly empty treasury, many unpaid bills, inadequate revenue, and countless problems, he had a good excuse for not attending.

Another member who declined to attend was John Palmer Usher, an Indiana lawyer who had come to Washington in 1862 to serve as Assistant Secretary of the Interior and became Secretary in 1863.

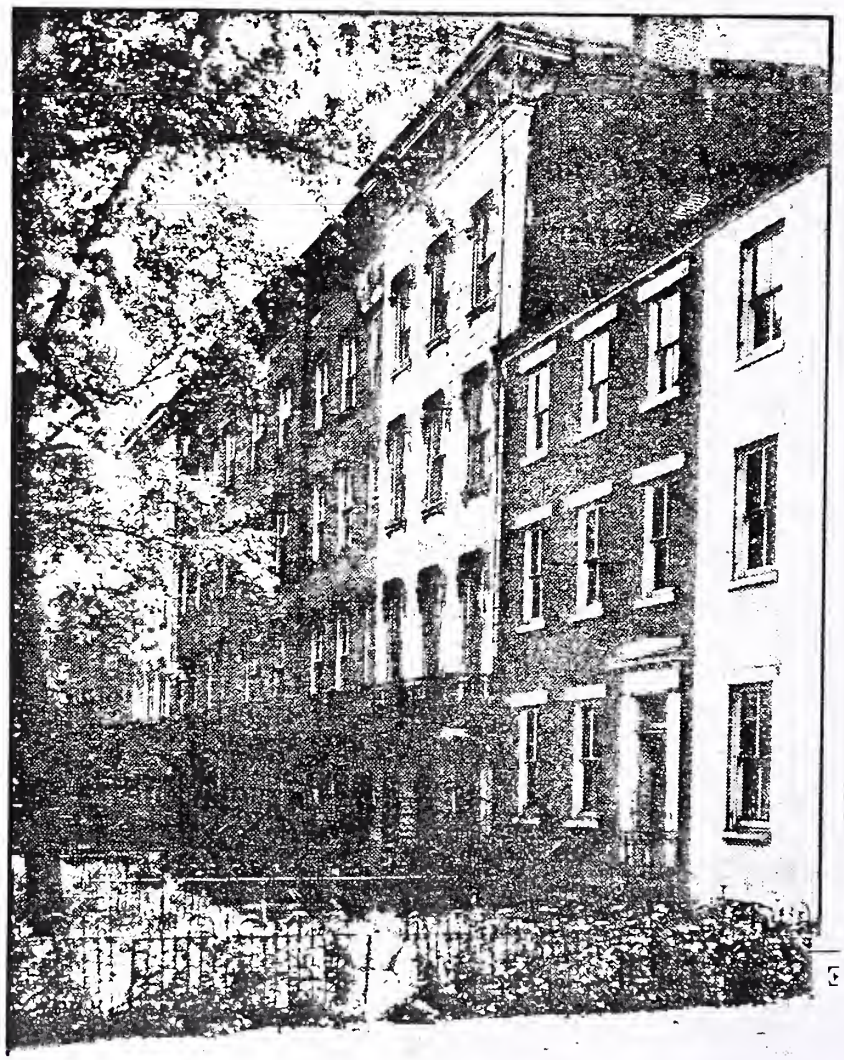
The Postmaster General was William Dennison of Ohio, one of the first political leaders in Ohio to join the Republican movement. He was serving as Governor of Ohio at the time the Civil War broke out. In June, 1864, he acted as chairman of the Republican Party Convention in the Front Street Theatre in Baltimore, where President Lincoln was nominated for re-election on the first ballot. Mr. Dennison, who had just been appointed Postmaster General, said he would attend the service in the Taney residence.

Thus there were three Cabinet members — Secretary of State Seward, Attorney General Bates, and Postmaster General Dennison — who agreed to go to the early morning service. They all went there in one carriage. Lincoln went in his carriage from the White House.

The 7 o'clock service was brief, brief enough to enable the mourners to reach the Baltimore & Ohio depot about 7:30. After the mournere had the chance to take a last look at the features of the deceased jurist, the coffin was carried out of the residence to the hearse by six pallbearers assisted by six Negro servants.

One of the pallbearers was Samuel Tyler, Taney's faithful friend from Frederick. Another was Lamon, Lincoln's bodyguard. Another was D. W. Middleton, Clerk of the United States Supreme Court. The others were James M. Carlisle, a member of the Supreme Court bar, Conway Robinson, and W. J. Stone Jr.

The President had an inconspicuous place in the funeral procession from the residence to the depot. With the exception of a detail of policemen, the people rode in carriages. First came Rev. Fr. Walter of St. Patrick's Church and Dr. Grafton Tyler, Taney's physician; then came the six pallbearers; then the hearse, on either side of which were two policemen; then J. Mason Campbell and his son; Joseph Taney, nephew of the



Fr. Maguire delivers eulogy at St. John's Church

deceased; and Messrs. Howard and Perine, relatives of the deceased.

Then came the President of the United States. Behind his carriage came the carriage of Secretary of State Seward, Attorney General Bates, and Postmaster General Dennison. Then came friends of the deceased, and finally the servants.

Upon the arrival at the railroad depot, Lincoln, after removing his high hat, walked with the three Cabinet members through the waiting room to the railroad track. Attorney General Bates was among those who climbed on board. The special train left for Frederick at about 7:30 a.m. Lincoln drove back to the White House.

At Relay House the train stopped to take on several men from Baltimore. Among them was Severn Teackle Wallis, one of the leaders of the Baltimore bar. Mr. Wallis was familiar with Frederick, for he had served as a member of the extra session of the legislature that met in Frederick in 1861. During the frenzy of excitement in Baltimore in September, 1861, Mr. Wallis was one of the group of prominent Baltimoreans who were arrested by order of General John A. Dix. He was imprisoned in Fort Monroe, Fort Lafayette, and Fort Warren until his release in 1862.

After a trip of about four hours, the special train arrived in Frederick at about 11:30. Waiting at the Baltimore & Ohio depot at South Market and All Saints Streets was a delegation of members of the Frederick County bar. After the coffin was removed from the train, the entire group of Washingtonians, Baltimoreans and Fredericktonians proceeded in a body to St. John's Catholic Church on East Second Street.

The beautiful St. John's Church was draped in mourning. Roger Brooke Taney had been a devout member of St. John's congregation all the years of his residence in Frederick, but he had attended the old church. The new edifice was not erected until after he had become Chief Justice of the United States. The new edifice was consecrated in 1837 and the steeple was not completed until 1854, ten years prior to Taney's death.

Before the clock in the steeple sounded the hour of 12, the crucifers were waiting to meet the procession of mourners at the front door of the church. After the coffin was carried into the church, solemn high mass was celebrated. Then followed a eulogy of the departed Chief Justice.

The priest chosen to deliver the eulogy of Taney was Rev. Fr. Bernard A. Maguire of Washington, D.C. Born in Ireland in 1818, he was brought to the United States when very young. The family settled in Frederick, thus affording young Maguire the opportunity to study at the St. John's Literary Institute, which was opened in 1829. After his preparatory studies in Frederick, he became a student at Georgetown College, and following his graduation he became a member of the Georgetown faculty even before his ordination in 1850.

Father Maguire served twice as the President of Georgetown College, first before Taney's death — from August, 1852, to October, 1858 — and after

Edward Bates, Attorney General

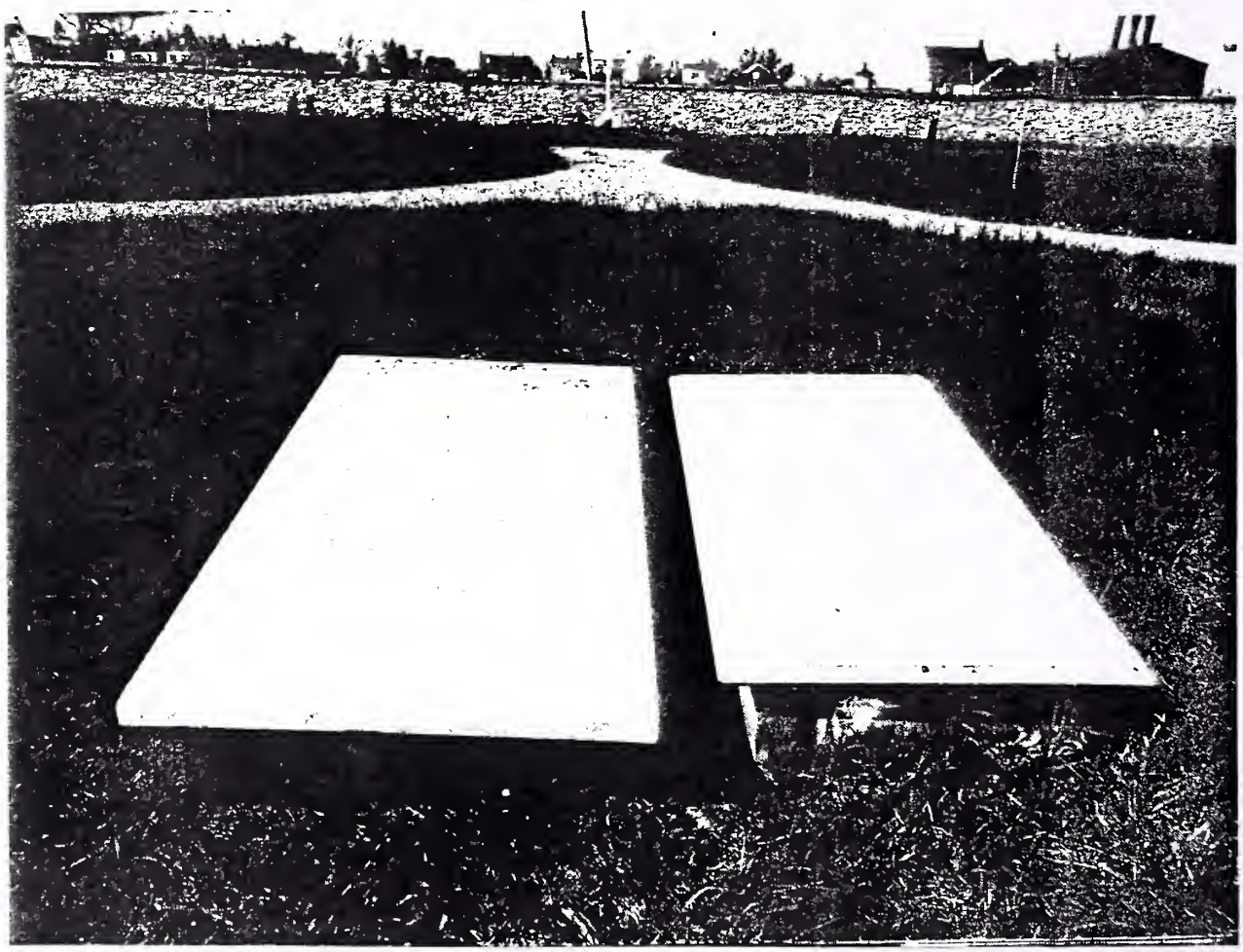
Few men in American life have been so grossly misrepresented'

Taney's death — from January, 1866 to July, 1870. It was natural that Father Maguire, who had lived in Frederick as a boy, should have been invited to come to Frederick to deliver the eulogy at Taney's funeral service. Not only was he familiar with the exemplary character of the Chief Justice, but he was recognized as one of the greatest pulpit orators of his day. Having been invited to speak in most of the big cities of the Nation, he became acquainted with many of the leading men of the Nation. Among the Presidents he had come to know were Franklin Pierce, who attended the Georgetown Commencement in 1854, and James Buchanan, who attended the commencement in 1857. In his second administration after Taney's death, President Ulysses S. Grant was his guest at the 1869 Commencement. Father Maguire's eulogy of Taney in St. John's Church on October 15, 1864, was a fitting tribute to the great jurist and one of the most important homilies in the history of the Church.

At the conclusion of the service, most of the assemblage wended their way to the little graveyard in the rear of the old church on the northern side of East Second Street. The only high official in the Lincoln administration who stood at the graveside was Mr. Bates, the Attorney General. Upon his return to Washington Mr. Bates wrote in his diary: "I saw his body placed in the grave (beside his mother, as he had ordered) in the old church yard."

For nearly six years there was no marker at Taney's grave. The two daughters who had been supported by Taney in his latter years found it difficult to make ends meet. For a time it seemed that very little money would be left after the payment of debts except ten thousand dollars in life insurance. The Virginia securities, ultimately regaining some of their value, yielded a few thousand dollars. But this was not sufficient for the support of the two daughters, who took unimportant jobs as clerks.

Two prominent Frederick men — Associate Judge Richard H. Marshall of the County Court and General James M. Coale, a member of the Frederick bar — were aware of the destressing situation



Old photograph of Taney's grave

in the Taney family. Would the Chief Justice's children approve of their placing a marker at the grave? They promptly gave their approval and their heartfelt gratitude. Accordingly in the summer of 1870 Judge Marshall and General Coale placed a marble slab over the grave. It contained this inscription:

I.H.S.
ROGER BROOKE TANEY
Fifth Chief Justice
of the Supreme Court
of The United States
of America
Born in Calvert
County, Maryland
March 17th 1777
Died in the
City of Washington
October 12th 1864
Aged 87 years,
6 months &
25 days

He was a profound and able Lawyer, an upright and fearless, Judge, a pious and exemplary Christian.

At his own request, he was buried in this secluded spot, Near the grave of his Mother. May he rest in peace.

Two years after the slab was placed on the grave, Samuel Tyler, Frederick lawyer and author, was delighted to learn that John Murphy & Company, Baltimore publishers, accepted his manuscript of a book entitled "A Memoir of Roger Brooke Taney, LL.D." for publication. Mr. Tyler had been selected by Chief Justice Taney, two years before his death, as his biographer. All of the Chief Justice's papers were placed in the hands of Mr. Tyler by his family and executors.

The first chapter of the Memoir was written by the Chief Justice himself. All of the other chapters were written by Mr. Tyler during the period of ten years.

Mr. Tyler decided to dedicate his book to Judge Marshall and General Coale. These were the words of his dedication, which he wrote in May, 1872:

> "Because of our friendship running through so many years, and the fact that you have signalized your veneration for the memory of Chief Justice Taney by erecting, with the permission of his family, a monument over his grave, I inscribe this Memoir to you."

In July, 1872, the publishers announced that the volume of nearly 700 pages was "nearly ready." They praised it as a work of "the highest interest to the Historian, the Lawyer, the Statesman, the Politician, and every class of intelligent readers." They also asserted that Taney's private acts would serve as examples to public officials for all time to come. They promised that a portion of the profits from the sale of the book would be for the benefit of Taney's family.

The Jesuits, who had charge of the little graveyard in which Monica Taney and her distinguished son were buried, pondered in the latter part of the 19th Century over the advisability of moving from their Novitiate to another location. Finally, after the beginning of the 20th Century they determined to move to St. Andrews on the Hudson at Poughkeepsie, New York. In 1902 they transferred their authority over the St. John's congregation to the clergy of the Diocese, and on January 15, 1903, at 6:40 a.m. they departed from Frederick on a special train of five coaches.

Because of the abandonment of the Novitiate by the Jesuits, the remains of Monica Taney and her son were exhumed and were removed to the newer St. John's Catholic Cemetery on East Third Street. There the two bodies were reinterred side by side, as the Chief Justice had requested.

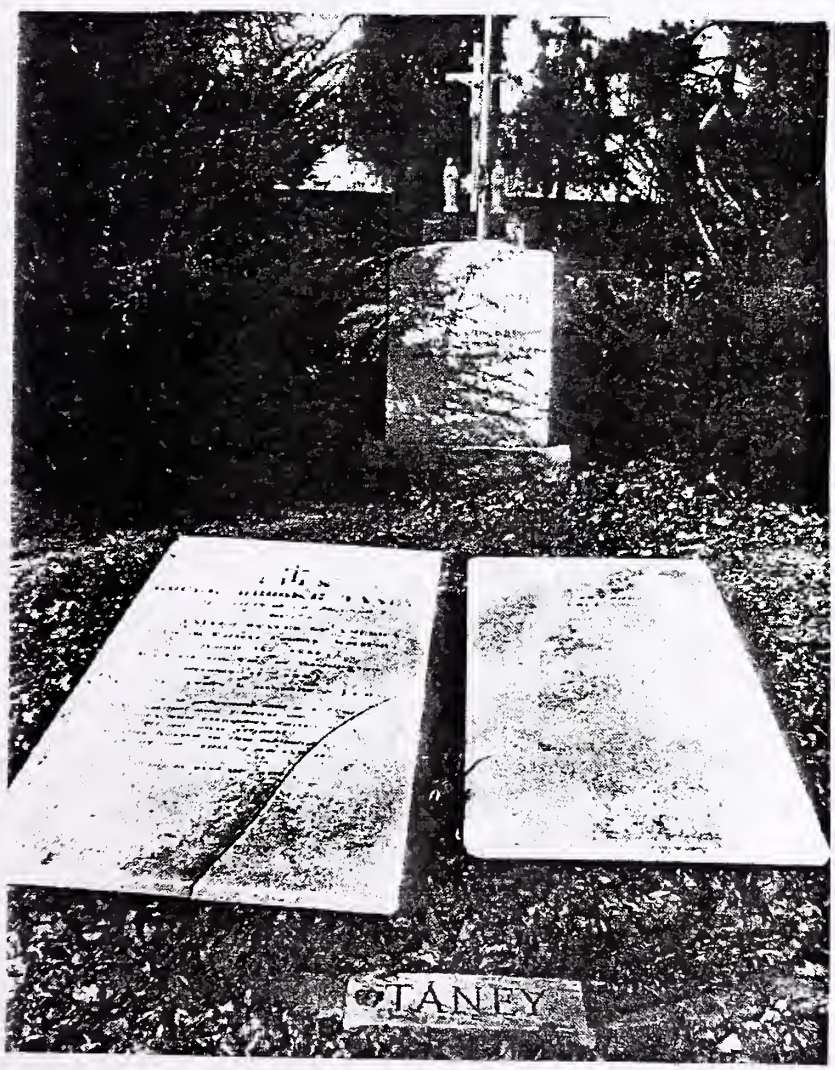
At the unveiling of the Urner bust of Taney in Court Park in Frederick on September 26, 1931, the 11th Chief Justice Charles Evans Hughes declared: "With the passing of the years, and the softening of old asperities, the arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice."

Many of the words of the inscription on the slab over Taney's grave have been obliterated by the passage of time. But an attractive monument, erected behind the grave by the Knights of Columbus of Cumberland, Maryland, on October 24, 1954, contained an inscription that revived the tribute to the jurist.

At the dediction of the monument, the 14th Chief Justice, Earl Warren, gave the following tribute to the fifth Chief Justice:

> "In a manner of speaking, today's tribute helps redress an old wrong — helps erase the calumny which Taney's enemies had hurled at him during his lifetime and which superficial historians preserved as gospel truth for a time after his death. Few men in American life — and surely no Justice of the Supreme Court — have been so grossly misrepresented as Taney."

The character of the jurist became more fully appreciated and his greatness became more generally accepted long before the 200th anniversary of his birth.



Taney's grave as it looks today

Lincoln Lore

Bulletin of the Louis A. Warren Lincoln Library and Museum. Mark E. Neely, Jr., Editor.
Mary Jane Hubler, Editorial Assistant. Published each month by the
November, 1978 Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801. Number 1689

DON E. FEHRENBACHER ON THE DRED SCOTT CASE: A REVIEW

The date and place of his birth are unknown. His real name may have been Sam, but history knows him by a very different and unforgettable name. Some described him as a shiftless troublemaker; others commended his character. He was a slave. He had several masters over the years, and his master for an important period of the slave's life was a hypochondriac and a ne'er-do-well who was syphilitic and may have died of syphilis, though genteel doctors rarely wrote such diagnoses on the death certificates of genteel slaveholders. When he sued for his freedom, the resulting legal battle made his name a household word; yet it is not at all clear who owned him at the time of the suit. The man whom the slave sued was too insane by the time of the trial to care about the result and died in a mental institution. His real owner may have been an antislavery politician from Massachusetts. The slave's lawyer would become a member of Abraham Lincoln's cabinet, but the lawyer's deepest desire was to send the slave "back" to Africa if he won the case. The slave lost his case for freedom and was almost immediately freed by his master.

The slave's name, of course, was Dred Scott. His syphilitic owner, Dr. John Emerson, carried Dred to Illinois (a free state) and to territory north of 36° 30′ latitude acquired in the Louisiana Purchase (and, therefore, free territory). The doctor later died, officially of consumption, in Davenport, Iowa Territory. His insane owner and the man he sued was named John F. A. Sanford, misspelled "Sandford" in the official report of the Supreme Court — a fitting symbol of the errors that have plagued the history of this complex case. The antislavery politician was Calvin Chaffee, who married the widowed Mrs. Emerson (*nee* Sanford), the sister of John F. A. Sanford. Scott's famous lawyer was Montgomery Blair, an ardent advocate of black colonization.

Professor Don E. Fehrenbacher of Stanford University has written what is sure to be the definitive book on the subject: *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). Yet "definitive" is not a good enough word, for a definitive book can also be ponderous, poorly written, and doggedly comprehensive without a hint of brilliance or innovation. On the contrary, this book is so clearly written as to be a model for all constitutional history written hereafter. It is as lively a treatment as is possible of an extremely difficult subject. Its conclusions are both sane and balanced on the one hand, and brilliantly perceptive and original, on the other. It is an achievement to be envied by any historian.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Roger B. Taney (1777-1864) feared that the "South is doomed to sink to a state of inferiority, and the power of the North will be exercised to gratify their cupidity and their evil passions, without the slightest regard to the principles of the Constitution."

Moreover, *The Dred Scott Case* is more than the best book ever written on the only Supreme Court case "every schoolboy" has heard of, it is practically a primer on constitutional law and the law of slavery, a brief history of the sectional issue in American politics, and a carefully reasoned argument about the causes of the Civil War. These are serious subjects, of course, and not ones that can merely be read about every night before going to sleep. They must be studied, and Professor Fehrenbacher's book must be studied. There is no problem with the writing style, which is lucid and lively, but the subject matter is difficult. Suffice it to say, that a chapter discussing the Lecompton constitution for Kansas, which many historians of the Civil War period regard as a nearly hopeless labyrinth of confusion, comes as a *relief* after the discussion of the issues raised in and by the Dred Scott decision.

Since *The Dred Scott Case* comprehends so many different subjects, its thesis cannot be neatly summarized in a sentence or two. In fact, it abounds in useful distinctions and insights on many different points. However, if one must say what the book argues in the main, it might be this: the Dred Scott decision was not an aberration, an inexplicably explosive decision from the hands of an otherwise restrained and erudite Chief

Justice, Roger Brooke Taney. The decision was consistent with his pro-Southern record and his willingness to see the United States Supreme Court intervene in difficult problems that plagued American politics. Moreover, the decision can be aptly characterized as a sloppy and tortured defense of Southern political interests from what militant Southerners perceived as a merciless Northern onslaught. As Fehrenbacher puts it, "the true purpose of Taney's Dred Scott opinion" was "to launch a sweeping counterattack on the antislavery movement and to reinforce the bastions of slavery at every rampart and parapet." The tone of Fehrenbacher's characterization of Taney's decision goes a good deal farther than the acknowledgment by Taney's judicious and fair-minded biographer, Carl Brent Swisher, that the Maryland-born Chief Justice wrote a decision that was defensive of the only section of the country he knew and the section he loved.

The two traits which most distinguish every part of Fehrenbacher's large book (595 pages of text and over 100 pages of footnotes) are balance and rigorous logic. Professor Fehrenbacher shares with his late colleague at Stanford, David M. Potter, a remarkable ability to show no sectional bias in any of his interpretations of American sectional conflict. He treats the causes and personalities of North and South with even-handed justice without at the same time excusing extremism and unreasonableness. It is this record of balance in appraising the sectional controversy up to the time of the Dred Scott decision which makes all the more devastating Fehrenbacher's relentless destruction of the court's opinion in that case.

The weapon of destruction is logic based on close and thoughtful reading of Taney's decision. Well before the point where he analyzes Taney's opinion, Fehrenbacher has repeatedly split arguments and distinctions into As and Bs and 1, 2, 3s — all to the benefit of the reader, always for the sake of clarification, and never with a false step. When he treats Taney's decision with the same precision, the results are remarkable.

To look closely at Taney's decision is in itself innovative despite the great fame of the Dred Scott case. The reasons for its being ignored in the past are many. Republican critics at the time, for example, were anxious to say that much of the decision was *obiter dictum,* that is, present in Taney's opinion but not crucial as a reason for deciding the case. Therefore, to many Republicans, there was no reason to examine much of the decision closely because much of the decision consisted of the irrelevant opinions of the Chief Justice on matters not at the heart of the case. Republican critics at the time, and a host of historians since, have tended also to focus on the question of the authoritativeness of the opinion as judged by how many of the Court's Justices concurred with or dissented from each of the various points made in the case. This has led to what Professor Fehrenbacher calls the "box-score method" of analyzing the Dred Scott decision, and he shows how absurd such interpretations are.

Fehrenbacher thinks it an error to seek ways of ignoring the decision. He looks at the decision itself, and what he sees in it is remarkable. Taney, for example, said that every "citizen" was a member of "the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives." This, Fehrenbacher points out, was a "gross inaccuracy": "A large majority of American citizens — namely, women and children — were not members of the sovereign people in the sense of holding power and conducting the government through their representatives." Negroes may not have been citizens but not for the reason Taney here described.

Likewise, Taney's assertion that, in the times of the Founding Fathers, Negroes "had no rights which the white man was bound to respect" was a "gross perversion of the facts." Taney's statement confused free Negroes with slaves, and, even then, "the statement was not absolutely true, for slaves had some rights at law before 1789." In fact, there were some respects in which "a black man's status was superior to that of a married white woman, and it was certainly far above that of a slave." The free black man "could marry, enter into contracts, purchase real estate, bequeathe property, and, most pertinently, seek redress in the courts." Republicans quoted Taney's harsh statement about white respect for Negro rights out of context as though it represented the Chief Justice's own views. Taney's defenders have pointed out that these were the opinions Taney said the Founding Fathers had; Taney was writing "historical narrative" here. Fehrenbacher shows that the statement was grossly prejudiced even as "historical narrative."

Taney's tortuous efforts to deny Negro citizenship were functions of his sectional fears and even of his Maryland background. He feared free Negroes, and he imputed this fear to the Founding Fathers, arguing that the slave states would never have ratified the Constitution if free Negroes had been included in the meaning of "citizens." Said Taney:

> For if they were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the right to enter every other State whenever they pleased, . . . to go where they pleased at every hour of the day or night without molestation, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Maryland was a state with a high population of free Negroes, and Taney's experience in such a state led him to forget that earlier in his opinion he had said that free Negroes were so few in number when the republic was founded that they "were not even in the minds of the framers of the Constitution." By his own admission, almost, Taney's mind and not the minds of the framers was dictating constitutional law here. In fact, as Fehrenbacher shows, Taney went to such lengths to exclude Negroes from the possibility of being naturalized citizens that his opinion made them *"the only people on the face of the earth who (saving a constitutional amendment) were forever ineligible for American citizenship."*

Fehrenbacher not only labels but proves Taney's history of the United States "phantasmal." He repeatedly demonstrates the Chief Justice's "chronic inability to get the facts straight." The important *obiter dictum* in the decision was not what Republicans usually criticized, but rather Taney's statement that a territorial government could not forbid slavery — "a question that had never arisen in the Dred Scott case." This, too, was a function of Southern fears. Fehrenbacher concludes that Benjamin Curtis and John McLean, the dissenting Northern Justices, "were in many respects the sound constitutional conservatives, following established precedent along a well-beaten path to their conclusions." By contrast, "Taney and his southern colleagues were the radical innovators — invalidating, for the first time in history, a major piece of federal legislation; denying to Congress a power that it had exercised for two-thirds of a century; sustaining the abrupt departure from precedent in *Scott v. Emerson* [an earlier stage of the case on its way to the Supreme Court]; and, in Taney's case, infusing the due-process clause with substantive meaning. And even though McLean did indulge his weakness for playing to the antislavery gallery, the southern justices were by far the more idiosyncratic and polemical."

It all sounds too pro-Northern to be true, but the balance with which Fehrenbacher treats the sectional crisis leading up to the decision and the balance of his appraisal of the decision's effects are the reader's assurance that Fehrenbacher's arguments have been carefully weighed. In the section of the book preceding the treatment of *Dred Scott v. Sandford,* Fehrenbacher traces the sectional controversy from the early period when the slave *interest* always triumphed over the antislavery *sentiment* in American politics, to the time when both became interests and tangled American politics in bitter and unresolvable disputes. There are far too many useful insights in this graceful, but thorough, survey to catalogue them all here, but one can at least see an example of Fehrenbacher's balanced approach.

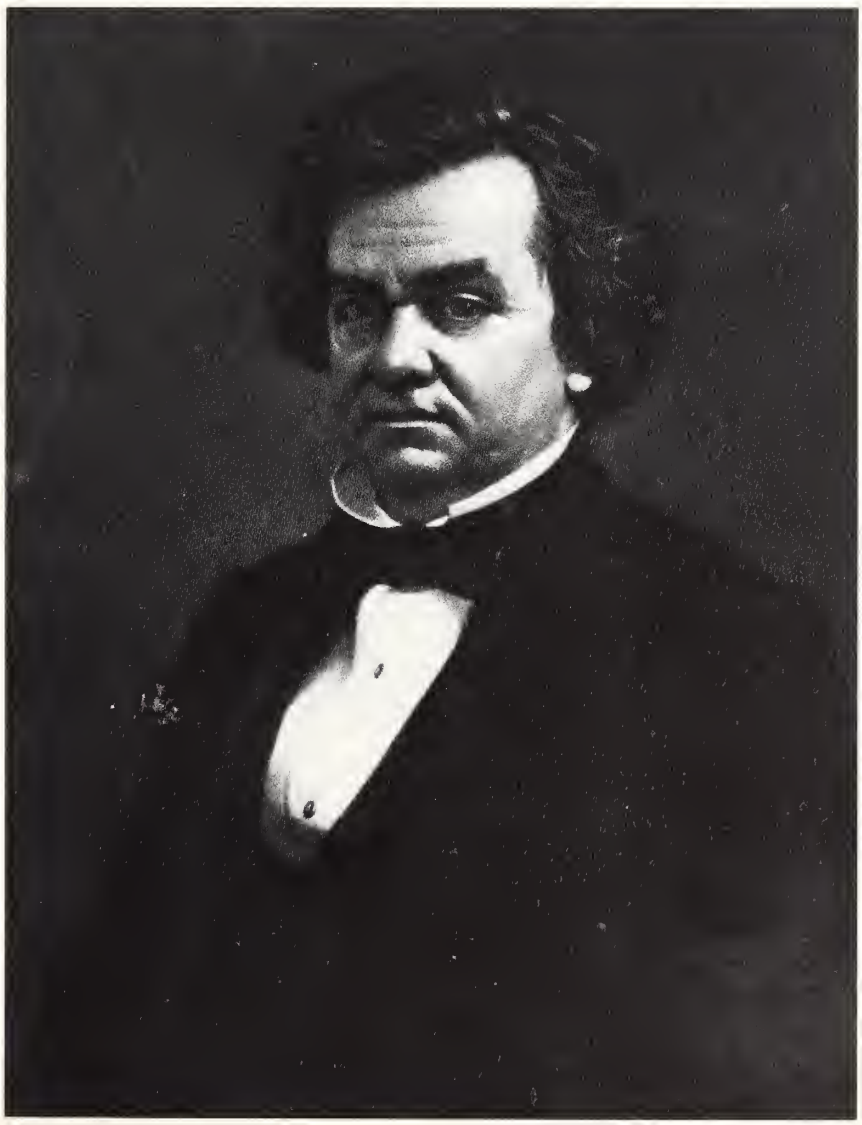
The fugitive-slave clause in the Constitution was a matter of little interest to the convention which passed it — late in the proceedings, by unanimous vote, and after little debate. Yet the myth soon arose that its passage had been essential to the acceptance of the Constitution by the slave states, a myth which was mouthed by the great Joseph Story in *Prigg v. Pennsylvania* (1842). He said the clause "constituted a fundamental article, without the adoption of which the Union could not have been formed." Thus the South gained unfair advantage here, Fehrenbacher says, and the federal govern-

ment became "a bulwark of slavery [,]. . . a development permitted but not required by the Constitution. It reflected not only the day-to-day advantage of interest over sentiment and the predominance of southern leadership in the federal government but also the waning of the liberal idealism of the Revolution." Here Professor Fehrenbacher sounds almost like the Republican Lincoln. He seems to voice an anti-Southern view of American history as a decline from the libertarian virtues of the Founding Fathers, a decline brought about the gradual erosion of the sentiment that slavery was wrong for the sake of the South's economic interest in slavery. Yet just five pages later, Fehrenbacher notes that Southerners were fair in their willingness to distinguish between "domicile" and "sojourn" in cases involving the presence of slaves in free states. If the slaveowner had taken up residence, the slaves were clearly free. If he was merely passing through on a sojourn, the slaves retained their original servile status. At first, Southern courts did not embrace the doctrine of "reattachment," whereby a slave returned to his home-state status when he returned to his home state, even if he had been in residence on free soil. Fehrenbacher says plainly, though, that the "northern states were the first to turn away from the tacit understanding" whereby courts in the two sections recognized the difference between domicile and sojourn. The quality of Southern justice did not change without provocation. This is balance.

Likewise, Fehrenbacher gives a balanced appraisal of the aftermath and consequences of the Dred Scott decision, and, as C. Vann Woodward has pointed out in another review of this book in the *New York Review of Books*, it is a modest appraisal. Fehrenbacher does not exaggerate the effects of the decision in his own views of the causes of the Civil War. If anything, he argues that the case was not as significant as historians have vaguely thought it was in causing the war.

One of Fehrenbacher's most interesting points is that the fight over the Lecompton constitution for Kansas and the personal image and reputation of Stephen A. Douglas were far more important than the Dred Scott decision in causing the war. A narrow decision which said nothing about Negro citizenship or the constitutionality of the Missouri Compromise line might not have averted sectional disaster. The effect of the Dred Scott decision was indirect. It "had no immediate legal effect of any importance except on the status of free Negroes. . . . it provoked no turbulent aftermath, presented no problem of enforcement, inspired no political upheaval." The Dred Scott decision "was in some ways like an enormous check that could not be cashed" by Southern leaders. The psychological frustration of intangible victory played a role but "only belatedly and indirectly." What was vital was "certain later developments."

The later developments in question revolved around the Lecompton controversy, "the last sectional crisis to end in compromise" and, therefore, "the close of the antebellum era in national politics." Fehrenbacher explains in a believable way the hopes and fears that were invested in that controversy. The Northern Democrats, having accepted as best they could the pro-Southern court decision, were in no condition to bear the weight of another Southern victory, and President Buchanan made a terrible error in asking them to do so. Stephen Douglas, who was much more the great compromiser of the 1850s than Henry Clay, seems out of character in spurning a practical political compromise on the Lecompton issue. Fehrenbacher carefully notes, however, Douglas's increasing inflexibility before that controversy, as



From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. Stephen A. Douglas, determined but a little dissipated, became the focus of fierce Southern animosity in the year of the Dred Scott decision, but not because of the decision. His break with the Buchanan administration over the Lecompton constitution for Kansas made him "suddenly, . . . a party insurgent and a doctrinaire, taking an inflexible stand on principle and in the end rejecting a compromise that satisfied even many of his fellow insurgents." Southern newspapers declared "war to the knife," and some expressed "serene indifference" to the outcome of his race against Lincoln for the United States Senate in 1858. The Mobile *Register* saw Douglas as "the worst enemy of the South and the most mischievous man now in the nation." When Democrats tried to select a nominee for President in 1860, Fehrenbacher says, "a majority . . . from the Deep South preferred to break up their party rather than accept the nomination of Douglas."

he participated in "the fashion of constitutionalizing debate on slavery in the territories." He had already moved from recommending his solution for the territorial issue to saying that the Constitution *demanded* his solution to the issue.

When Douglas took his anti-Lecompton and anti-Southern stand, it "proved to be the crucial event that set the Democratic party on the path to disruption." The intensity of Southern attacks on Douglas was the intensity of hatred, not for an alien enemy, but for a *traitor*. As a Georgia editor put it, "Douglas was with us until the time of trial came; then he deceived and betrayed us." His defection was a symbol of the failure of the last hope for Northern fairness. Thereafter, the South was desperate and frantic. The coming of the war was at times a function of an almost *ad hominem* argument by Southerners against Douglas. Many historians have thought that the "Freeport Doctrine," announced by Douglas in his famous debates with Lincoln, made Douglas unacceptable to the South. Fehrenbacher is prepared to say, on the contrary, that the doctrine was made unacceptable by Douglas's advocacy of it.

Professor Fehrenbacher has long been associated with the view that the importance of the Freeport question has been greatly exaggerated. That was one of the revolutionary points of his brilliant book, *Prelude to Greatness: Lincoln in the 1850's*. In *The Dred Scott Case,* he is able to argue an even more convincing case for it by focusing more on Douglas than Lincoln. But what about Lincoln? How does he figure in this new work?

Fehrenbacher makes some interesting points. First, Lincoln's criticism of the Dred Scott case was not like the mainstream of Republican criticism which tried to dismiss the controversial parts of the decision as mere *obiter dicta*. Lincoln, instead, took the tack that a Supreme Court decision, though it must ultimately become authoritative, did not necessarily reach that authoritative status unless it were grounded in sound historical facts, were repeated by the Court in several decisions, represented the views of the bulk of the Justices, and met numerous other conditions that were functions of time. Likewise, Lincoln's first (and truest?) response to the decision was to denounce the historical absurdity of Taney's assertions about the state of opinion of the Founding Fathers on the Negro and to document a decline in recent times from the rather decently libertarian sentiments of the framers of the Constitution. His better-known response came a year later, in 1858, and in the midst of a dogged struggle with Douglas for the United States Senate. In negrophobic Illinois, Lincoln did not need to be seen, as Douglas tried to picture his opponent's opposition to the Dred Scott decision, as primarily concerned about Taney's denial of Negro citizenship. Illinois did not want Negro citizens, but Illinois feared Southern political power, and Lincoln thereafter characterized Taney's decision as part of a conspiracy, begun by Douglas in 1854 and continued by Presidents Pierce and Buchanan, to nationalize slavery. Lincoln concentrated less and less on the lamentable doctrines in the Dred Scott decision itself. Instead he warned of a *second* Dred Scott decision which would make not only Congress and territories but also *states* incapable of outlawing slavery.

Professor Fehrenbacher further establishes his reputation as a fine writer in this book. It does seem that his prose has become slightly less formal than it used to be. He occasionally uses colloquial terms: "mixed bag" (page 342); "continuing on" (page 366); and "finish up" (page 536). Whether by calculation or by virtue of the spirit of the times, which have altered our language more in the direction of the common man, this has the effect, not of spoiling his excellent writing, but of making this book on a subject of forbidding complexity more palatable to the reader.

No book, of course, is beyond criticism. Because much of the book's import hinges on an accurate appraisal of Taney's personality and political thought, it is a shame the Chief Justice remains such a shadowy figure. The Dred Scott opinion was the opinion of a very old man; it might be interesting to know whether some of the glaring faults of the opinion followed a pattern of declining mental powers generally in his late opinions. It seems odd, given the particular shape Taney's opinion took, that there is no investigation of the doctrines of the age to which it seems an answer. That is, Salmon P. Chase and others had been forging an antislavery interpretation of the Constitution, and the Declaration of Independence loomed large in antislavery arguments. Was Taney's preoccupation with the Founding Fathers strictly a function of a judicial need to know the opinions of the framers of the document from which American law derived? Did not Republican ideology shape his defense as much as the demands of Southern interests and of constitutional law?

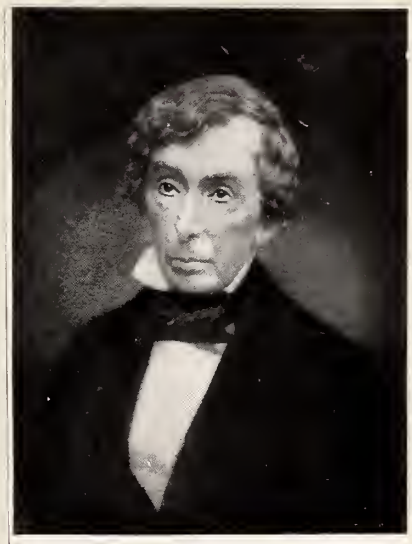
There are doubtless other and better questions yet to be answered, but Fehrenbacher's book answers many more questions that it begs. *The Dred Scott Case* is a great book, far too great to be comprehended in any single review (or reading). Every serious student of the period must read it, and, because of Professor Fehrenbacher's careful research and attention to clarity in writing, the reading will be an unalloyed pleasure.

AN IMPORTANT ANNOUNCEMENT

Professor Fehrenbacher has generously consented to present the second annual R. Gerald McMurtry Lecture. The 1979 Lecture will occur on the night of May 10, at the Louis A. Warren Lincoln Library and Museum. The Lecture is free to the public and is followed by an informal reception for the lecturer. For further information, please write Mark Neely, Louis A. Warren Lincoln Library and Museum, 1300 South Clinton Street, Fort Wayne, Indiana 46801.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 3. Professor Don E. Fehrenbacher.



Roger B. Taney

A TRIP THROUGH

The Home and Slave Quarters *of* CHIEF JUSTICE TANEY

FREDERICK, MARYLAND

A NATIONAL SHRINE AS A MEMORIAL TO

ROGER BROOKE TANEY
Author of the Dred Scott Decision

and his brother-in-law

FRANCIS SCOTT KEY
Author of "The Star-Spangled Banner"

ROGER BROOKE TANEY

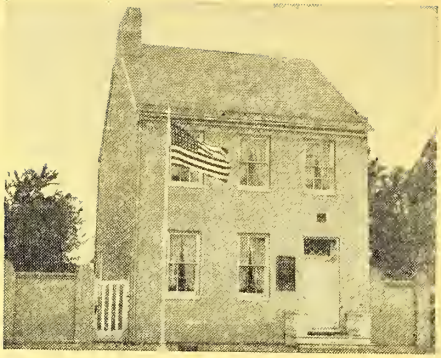
1777—Born In Calvert County
1795—Graduates from Dickinson College
1799—Admitted to Bar and elected to Legislature
1801—Commences practice of law in Frederick
1806—Marries Anne Key, sister of Francis Scott Key
1816-1821—Member of Maryland Senate from Frederick County
1827-1831—Attorney General of Maryland
1831-1833—Attorney General of the United States
1831—Acted as Secretary of War ad interim while serving as Attorney General.
1833—Appointed Secretary of the Treasury, directs that Government deposits shall not be made in the Bank of the United States.
1834—His nomination rejected by the United States Senate, resigns as Secretary of the Treasury.
1836—Becomes Chief Justice of the United States Supreme Court, succeeding John Marshall
1857—Delivers the decision In the celebrated Dred Scott Case, which was reversed by the Civil War.
1861—Administers Presidential oath to Abraham Lincoln
1864—Dies in Washington.

Grave and monument In Frederick.

FRANCIS SCOTT KEY

1779—Born on the Key estate, Frederick County, now within borders of Carroll County
1796—Graduates from St. John's College
1800—Commences practice of law In Frederick
1802—Marries Mary Lloyd In Annapolis
1807—Argues his first case in the U. S. Supreme Court as counsel for two men accused of treason as messengers of Aaron Burr
1814—Writes "The Star-Spangled Banner" at the time of the British attack on Baltimore
1816—One of the organizers of the American Colonization Society
1831—Urges Taney to enter Jackson's Cabinet as Attorney General
1833—Appointed by President Jackson U. S. District Attorney for the District of Columbia, and at the President's direction goes on special mission to Alabama to help settle the controversy between the Federal and State Governments over the Creek Indian lands.
1834—Guest of honor with Taney at historic banquet in Frederick
1842—Delivers his last and most notable speech on slavery before the Colonization Convention
1843—Dies In Baltimore

Grave and monument In Frederick.



FRONT VIEW OF TANEY HOME
ERECTED IN THE YEAR 1799

Approaching the front of the home of Chief Justice Roger Brooke Taney, the vistor's attention is directed to its Georgian architecture, plain in style, but with a touch of refinement given by its original cornice and the Colonial transom above the entrance door—the same threshold that Taney and his wife and daughters entered over a century ago.

— DRAWING ROOM —

Entering the drawing room, you see the painting of the dramatic inaugural of 1861, when Chief Justice Taney administered the presidential oath to Abraham Lincoln, that he would "preserve, protect and defend the Constitution of the United States." This canvas by Henry Roben depicts Seward, Breckinridge, Chief Justice Taney, Edward D. Baker, Clerk of the Court Carroll, Buchanan, Lincoln, Salmon P. Chase, Stephen A. Douglas and Horace Greeley.

You are asked to register at the desk of the Chief Justice. On this old desk Mr. Taney penned his celebrated opinion in the Dred Scott case, a landmark in American jurisprudence, said to have caused more dissension than any other legal opinion in the history of the world.

Directly in front of the fireplace is a small slate stone with an iron ring, covering a copper tinder-box.

Before leaving this room you will notice on the right wall portraits of the seven Presidents whom Taney inducted into office—Van Buren, Harrison, Polk, Taylor, Pierce, Buchanan, and Lincoln—more Presidents than were inaugurated by any other man in American history.

The bust of Tancy is the work of Joseph Urner, Maryland sculptor.

— DINING ROOM —

You now enter the dining room. In this room is the Stryker Collection, including the silver coffee pot and the silver tea pot used by Chief Justice and Mrs. Taney, also Chief Justice Taney's key-winding watch and gold fob.

The miniature—the earliest known picture of Taney—was presented to Miss Anne Key, who became his wife in 1806.

On one of the walls you will see woodcuts of the famous John Brown Raid. You will also notice one of John Brown's pikes and a musket used in the insurrection. On another wall is a collection of photographs and other portraits of Chief Justice Taney.

Among the original documents in the dining room are messages signed by Taney as Secretary of the Treasury. In this exhibit is a steel engraving of the United States Bank, from which Taney removed the Government deposits in 1833.

— KITCHEN —

Stepping back into the yard, you first take a glimpse of the kitchen with its original Dutch oven—in splendid state of preservation—and the century-old utensils.

— WINE CELLAR —

To the right of the kitchen door is a stairway leading down to the wine cellar. This chamber, with its barrels and bottles, shows how the wine cellars looked one hundred years before the advent of national prohibition. To the left, enclosed in a case, is a book of recipes for making wines and liquors. This book is of Taney's time and elicits much interest.

— SLAVE QUARTERS —

Coming up from the cellar, you proceed along the flagstone walk, taking a casual glance at the smoke house wherein the meats for the family were cured; then the work room with the spinning wheel and the old implements of employment for the slaves.

You now come to the living room of the slaves. Chief Justice Taney, notwithstanding his decision in the Dred Scott case, never personally approved of human slavery; and in this room are exhibited records of the manumission of Taney's slaves.

At the end of the garden, you have a favored view of the structure with its great stone chimney—typical slave quarters of the old South, set in quaint surroundings.

— STAIRWAY —

And now a trip back to the main dwelling. To the right, as you start to climb to the second floor, you see a rare specimen of the Stars and Stripes. This original "Lone Star State Flag" was used in Henry Clay's campaign for President in 1844, when the chief political issue was the question of taking Texas into the Union as a Slave State.

— BEDROOM —

At the head of the stairs you come to the Taney bedroom. All of the furniture is early American. The portrait of Taney was autographed by him and presented to his daughter Alice in 1855.

THE FRANCIS SCOTT KEY ROOM

Named in memory of Francis Scott Key, who came to Frederick immediately after the bombardment of Fort McHenry and related to Taney how "The Star-Spangled Banner" was written.

This song of victory was adopted as the National Anthem by an Act of Congress approved by President Herbert Hoover on March 3, 1931.

To the right, as you enter the Key Room, is a collection of portraits and papers from the Key family. The original Chippendale chair was once owned by the author of "The Star-Spangled Banner."

And next we come to America's benefactor from across the seas, Marquis de Lafayette. Here is one of the very few letters written by Lafayette during the Revolutionary War. The memorial erected at Jug Bridge by the Sons of the American Revolution marks the spot where Lafayette was met on his visit to Frederick in 1824.

One of the Nation's leaders during the Revolution was Thomas Johnson, first Governor of the State of Maryland, who nominated George Washington for Commander-in-Chief of the Continental Army. In the Thomas Johnson exhibit is an oil painting of his home, Rose Hill, one of Frederick's finest Colonial mansions. In the open fireplace is an iron "fire-back" made in 1776 by Johnson and his brothers at the famous Catoctin Furnace. You will notice that Governor Johnson's will was written by Taney and signed by him as a witness.

In the glass case in the center of the room you see a collection of orlginal manuscripts and other mementoes of Francis Scott Key. On the top shelf of the case is a copy of the anthem showing exactly how it was written by Key in 1814, concluding with the words:

O thus be it ever when freemen shall stand
Between their lov'd home and the war's desolation!
Blest with vict'ry and peace may the heav'n rescued land
Praise the power that hath made and preserv'd us a nation!
Then conquer we must, when our cause it is just,
And this be our motto—"In God is our trust,"
And the Star-Spangled Banner in triumph shall wave
O'er the land of the free and the home of the brave.